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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

IN RE

ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, AND LORRAINE GORSKI,

Petitioners

v.

COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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35 pp

QUESTIONS PRESENTED

A. Whether the conflict created by the decision given in this case by the Honorable Court of Appeals of the First Circuit, affirming removal of the case from the Superior Court, San Juan Part, of Puerto Rico to the United States District Court for the District of Puerto Rico, filed thereat under Fair Labor Standards Act of 1938, as amended, (FLSA) 29 U.S.C. 201 *et seq.* is to be dissolved or is it to prevail over the longstanding doctrine of *Johnson v. Butler Brothers,* 162 F.2d 87 (8th Cir., 1947), which prohibits such removals.

B. Whether or not the erroneous interpretation of the laws of Puerto Rico, tantamount to legislating for the Commonwealth, by the United States Court of Appeals for the First Circuit should prevail in the face of the preemption doctrine protecting Section 218(a) of the FLSA.

C. Whether the "most beneficial" clause of Section 218(a) of the FLSA is to preempt or not dispositions of Title 29 Laws of Puerto Rico, Section 246e(a)(2), which make inapplicable "most beneficial" state laws to employees of nonappropriated fund instrumentalities (NAFIs) of the federal government in the light of Congressional waiver of immunity since the 1966 and 1974 Amendments to the FLSA and the case of *Joe G. Garcia v. San Antonio Metropolitan Transit Authority, et al.,* 53 LAW WEEK 4135, February 19,1985, 105 S. Ct. 1005 (1985).

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B. The United States Court of Appeals for the First Circuit has decided an important question of federal law, that is, application of the "most benficial" laws of Puerto Rico, authorized under Section 218(a) of the FLSA, to the nonappropriated fund instrumentalities of the Armed Services (NAFIs), in a manner detrimental to the public policy of Section 202, and against the "most benefiical" clause of Section 218(a) of the FLSA, and in violation of Clause 2, Article IV of the Constitution of the United States. Further, the matter has been decided against the constitutional principle of separation of branches and against the principle of deference to the legislative branch of the Commonwealth of Puerto Rico. These matters have not been, but should be settled by this Court 21

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ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, AND LORRAINE GORSKI,

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COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The petitioners ANGEL M. COSME NIEVES, *et al.*, filed claim in the State Court of competent jurisdiction against respondents under the FLSA and under the "more beneficial" laws of the Commonwealth of Puerto Rico. (App. 1a) The case was removed to the United States District Court for the District of Puerto Rico. The following orders are pertinent to the case:

a. Complaint, PE 82-1381, October 9, 1982 under the Fair Labor Standards Act (FLSA), (App. 1a)

b. Opinion and Order, U.S. District Court for the District of Puerto Rico, April 15, 1983. (App. 9a) (561 F. Supp. 1173)

c. Order of the Court, United States Court of Appeals for the First Circuit, August 22, 1983. (App. 13a)

d. Memorandum and Order, United States Court of Appeals for the First Circuit, October 7, 1983. (App. 14a)

e. Opinion and Order, U.S. District Court for the District of Puerto Rico, January 8, 1985. (App. 15a) (601 F. Supp. 100)

f. Judgment, U.S. District Court for the District of Puerto Rico, January 14, 1985. (App. 23a)

g. Decision on Appeal, United States Court of Appeals for the First Circuit, March 18, 1986. (App. 24a)

h. Judgment, U.S. Court of Appeals for the First Circuit, March 18, 1986. (App. 42a)

The United States Court of Appeals for the First Circuit (USCA-1C) held that "it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in the Claims Court against the United States." The Appeals Court further held "that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself. The USCA-1C, however, held against the plaintiffs that "the case was properly removed pursuant to 28 U.S.C. 1441," (App. 37a) and further dismissed plaintiffs claims brought under Section 218(a) of the FLSA and the laws of Puerto Rico, (App. 42a), but directed the district court to address the merits of plaintiffs' claim under Section 218(b)(2) of the FLSA, (App. 41a).

JURISDICTION

a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1), 2101(c) and under Rule 19, paragraph 1(a) and (b) of the Supreme Court Rules, 28 U.S.C. Rule 19.

b. The USCA-1C exercised its jurisdiction under 28 U.S.C. 2107.

c. The Opinion and Order and the judgment of the USCA-1C is dated March 18, 1986 and this petition is filed within the ninety (90) days authorized by law.

STATUTORY PROVISIONS INVOLVED

a. United States Code, Title 29.

Section 216

(a) Penalties; civil and criminal liability; injunction proceeding terminating right of action; waiver of claims; actions by Secretary of Labor; limitations of actions; savings provision.

(b) Any employer who violates the provisions of 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of Section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropraite to effectuate the purposes of section 215(a)(3) of this title, shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal

amount as liquidated damages. *An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.* No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such party and such consent is filed in the court in which such action is brought. *The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorney's fee to be paid by the defendant, and costs of the action.* (Emphasis furnished).

Section 218 Relation to other laws.

(a) *No provisions of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter* and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or to justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Chapter. * * * (Emphasis furnished)

(b) Notwithstanding any other provision of this chapter (other than section 213(f) of this titte) or any other law –

(1) any Federal employee in the Canal Zone engaged in employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate, provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation set at an hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

Section 203(d) Definitions

As used in this Chapter.

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

1966 Amendment. Subsec. (d) Pub.L. 89-601, section 102(b), expanded the definition of employer to include a state or a political subdivision thereof with respect to employees in a hospital, institution, or school referred to in the last sentence of subsec. (r) of this section, or in the

operation of a railway or carrier referred to in such sentence.

b. United States Code, Title 28.

Section 1331 Federal Question (As of June 25, 1984)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Federal Question (As of February 4, 1983)

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Section 1337 Commerce and anti-trust regulations (As of June 25, 1948)

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Commerce and antitrust regulations; amount in controversy, costs (As of February 4, 1983)

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. Provided, however, that the district courts shall have original jurisdiction of an action brought under section 1717 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and cots.

(b)

(c)

Section 1441 Actions removable generally (As of June 25, 1948)

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c)

Actions removable generally (As of February 4, 1983)

(a) Substantially identical to corresponding section in effect June 25, 1948.

(b) *Id.*

(c)

(d)

c. Laws of the Commonwealth of Puerto Rico, Title 29.

Section 273 Extra hours

Extra hours of work are:

(a) The hours that an employee works for his employer in excess of eight hours during any period of twenty-four consecutive hours;

(b) The hours that an employee works for his employer in excess of forty hours during any week, unless the hours worked daily in excess of eight are paid at double rate;

(c) The hours that an employee works for his employer in excess of the hours stipulated by the Secretary of Labor in the public notice he shall give according to section 272 of this title;

(d) The hours that an employee works for his employer during the days or hours when the establishment in which he renders services should remain closed to the public by provision of law; Provided, however, That the hours worked by an employee in the service of his employer during the days or hours in which the establishment

must remain closed to the public shall not be considered extra hours of work, when the employer has obtained from the Secretary of Labor the permit required by sections 289 and 290 of this title, and the total number of hours worked by the employee during said day does not exceed eight hours, and the total number of hours worked during the week does not exceed forty hours;

(e) The hours that an employee works for his employer during the day of rest heretofore or hereafter fixed by law in the case of businesses and industries not subject to the closing of their establishments;

(f) The hours that an employee works for his employer in excess of such maximum working hours a day as the Minimum Wage Board may have fixed or may fix for the occupation, business, or industry in question;

(g) The hours that an employee works for his employer in excess of the maximum number of working hours a day fixed in a collective labor agreement.

Section 283 Posting notice of work hours; printed models

Every employer. . .

When the employees. . .

The period assigned for taking food should commence not before the conclusion of the third, nor after the commencement of the sixth consecutive hour of work, so that at no time would the employees be required to work more than

five consecutive hours without pausing in their duties to take food.

Every employer who employs or permits an employee to work during the period fixed for taking food, shall be bound to pay for said period or fraction thereof at a wage rate equal to double the rate agreed upon for regular hours. In such cases where. . .

Section 274 Extra wages for extra hours

Every employer who employs or permits an employee to work during extra hours shall be obliged to pay him for each extra hour a wage rate equal to double the rate agreed upon for regular hours; *Provided,* however, That every employer in any *industry* in Puerto Rico covered by the provisions of the Fair Labor Standards Act enacted by thc Congress of the United States on June 25, 1938, as heretofore or hereafter amended, shall be under obligation to pay only for each hour of work in excess of the legal eight-hour working day, or in excess of forty (40) hours a week, a wage at the rate of not less than time and a half the rate of wage agreed upon for regular hours, save when by a decree of the Minimum Wage Board or by a collective labor agreement, other working and/or compensation standard is heretofore or hereafter fixed. To determine the wage rate agreed upon for regular hours of work, the daily, weekly, or monthly wages, or wages otherwise stipulated, shall be divided by the number of regular hours worked during the same period in accordance with the provisions of sections 271-278 of this title. (Emphasis supplied)

Section 285 Occupations subject to law; Exceptions

The provisions of * * *

The provisions of * * *

The provisions of * * *

The provisions of sections 271-288 of this title shall not apply to the employees of the Commonwealth Government, of the municipal governments, of the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting such agencies, and instrumentalities as are devoted to agricultural, industrial, commercial or public service enterprises.

Section 246e Persons excluded.

(a) *Sections 245-246m of this title shall not apply to:*

(1) Persons employed * * *

(2) *Persons employed by the Government of the United States of America or by the* Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises; and . . . . (Emphasis supplied)

(3) Persons employed * * *

(b) The provisions of * * *

STATEMENT OF THE CASE

This case was filed at the Superior Court of Puerto Rico (App. 1a), on October 13, 1982, against a nonappropriated fund instrumentality (NAFI) under the Fair Labor

Standards Act (FLSA) of 1938, as amended, 29 U.S.C. 201, *et seq.*, specifically under section 218(b)(2), and the "most beneficial" laws of the Commonwealth of Puerto Rico for a one-half wage rate beneficial increment over the wage rate of the FLSA for overtime and work performed during meal hours. Because the court of competent jurisdiction of Puerto Rico is a court of general jurisdiction, the source of the jurisdiction and the source of the right of action were not specified in the complaint, though generally indicated therein. (App. 1a) The "most beneficial" laws of Puerto Rico are authorized under the "most beneficial" clause of section 218(a) of the FLSA.

The case was removed to the United States District Court for the District of Puerto Rico (USDC-DPR) on February 4, 1983. A motion to remand filed on February 16, 1983, was denied as per Opinion and Order entered on April 15, 1983 by Judge Juan M. Pérez Giménez. (App. 12a) Review with a petition for a Writ of Mandamus or Certiorari was denied under the doctrine against "piecemeal review." (App. 13a)

The (USDC-DPR) further dismissed the case for alleged want of subject matter jurisdiction and for alleged failure of plaintiffs to state a claim upon which relief could be granted. (App. 23a)

Appeal to the United States Court of Appeals for the First Circuit (USCA-1C) was undertaken, and after intervention by the United States Justice Department of December 13, 1985, the United States conceded that the NAFI is a proper defendant under the FLSA, and that the District Court rather than the Claims Court has jurisdiction over this suit. (App. 34a) The USCA-1C held that "it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in

the Claims Court against the United States." The Appeals Court further held "that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself, to the extent of its nonappropriated funds." (App. 33a)

The Court of Appeals, however, held against the plaintiffs that "the case was properly removed pursuant to 28 U.S.C. 1441," (App. 37a) and further dismissed plaintiffs' claim brought under section 218(a) of the FLSA and the "most beneficial" laws of Puerto Rico, App. 40a), but directed the district court to address the merit of plaintiffs' claim under section 218(b)(2) of the FLSA (App. 41a).[1]

REASONS FOR GRANTING THE WRIT

A. REMOVAL OF FLSA CASES FROM STATE COURT TO THE UNITED STATES DISTRICT COURTS

(1) Conflict among Courts of Appeals

The decision rendered by the USCA-1C is in conflict with the decision given by the United States Court of Ap-

---

[1]The uncertainty created by the decision of the Appeals Court in respect to the specificity of plaintiffs' claim under section 218(b)(2) of the FLSA is herein cleared with the affirmation that the plaintiffs' fundamental claim is based on section 218(b)2) for unpaid back wages and overtime, and on section 218(a) for the "most beneficial" increment in the overtime rate to be paid under the laws of Puerto Rico which is one half the regular rate above the maximum payable under the FLSA. The Commonwealth law authorizes payment of work performed during the meal hours at double the regular rate. Because the Superior Court of Puerto Rico is a court of general jurisdiction, no specificity as to jurisdiction and to the legal origin of the cause of action is required. The general mention of the FLSA, though not required, established the fundamental claim under section 218(b)2) for unpaid wages and overtime. The facts alleged in the complaint are pointed in that direction. (App. 40a)

peals for the Eighth Circuit in the case of *Johnson v. Butler Brothers,* 162 F.2d 87 (8th Cir., June 11, 1947).

(2) The Background of the Johnson Case

Section 216(b) of the FLSA, in effect since the FLSA was enacted in June 25, 1938 though amended on May 14, 1947, read, on June 11, 1947, substantially as follows:

> "Any employer who violates the provisions of section 6, or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in additional equal amount as liquidated damages. *Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and such employee or employees may designate an agent or representative to maintain such action for in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the actions."* (Emphasis added)

This legislation brought about a flood of wage and overtime litigation in both, State and Federal district courts as expected, but contrary to the expectation, the flood of litigation was accompanied by the confusion provoked by the removal statute. There was not much confusion as to the jurisdiction of state "courts of competent jurisdiction." That problem was settled very early by *State of Missouri, ex rel St. Louis, Brownsville & Mexico Railway Co. v. Taylor,* 266 U.S. 200, 208 (1924), but the confusion

provoked by the removal statute, still lingers, though the majority of the courts are against removal of FLSA cases.

These courts based their positions against removal, as of June 10, 1947, among other things, on:

(a) That section 216(b) of the FLSA did not constitute the "Constitution or law of the United States" argument raised by the foes of remand. *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451 at 453 (1942).

(b) That section 216(b) of the FLSA constituted the expression of Congress as an exception to the removal statute. (*supra*, underlined) *Apple v. Shulman Publications, Inc.*, 65 F. Supp. 677 (1943) At 678.

(c) That the legislative purpose, in harmony with the prompting impulse of the FLSA, was to grant a broad jurisdiction for the enforcement of the obligations imposed under the Act. *Booth v. Montgomery Ward & Co., supra,* at 455.

(d) That the express amendment of the removal statute was not required to make the legislative purpose effective. *Booth v. Montgomery Ward & Co., supra,* at 456.

(e) That the FLSA clearly shows the intention of Congress to authorize the state courts, as well as the national courts *to hear and determine* questions arising under the Act. *Smith v. Day & Zimmerman,* 65 F. Supp. 209, at 210.

(3) The Johnson Case

This case, similar to the one at bar, held that FLSA cases under section 216(b) are not removable from state courts.

Because this case was so important for the proper administration of the FLSA, the Department of Labor of the United States was present as amicus curiae.

Quote from the *Johnson case, supra:*

> **[2]** The right of action created by the Act, being one which arises under a law regulating commerce, may be enforced in a federal district court, regardless of the amount in controversy or of the citizenship of the parties. 28 U.S.C.A., section 41(8).[2] The right may also be enforced in a state court of competent jurisdiction. See State of Missouri ex rel. St. Louis, Brownsville & Mexico Railway Co. v. Taylor, 266 U.S. 200, 208, 45 S.Ct. 47, 69 L.Ed. 247, 42 A.L.R. 1232. The District Court of Crow Wing County, Minnesota, is unquestionably a court of competent jurisdiction.
>
> If Congress had omitted from section 16(b) of the Act the words "in any court of competent jurisdiction," we think the right of the defendant to remove this case to the fedeal court could not successfully be challenged. *Title 28 U.S.C.A., section 71,* authorizes the removal of a "suit of a civil nature * * *, *arising under the * * * laws of the United States * * *, of which the district courts of the United States are given original jurisdiction * * *.*"
>
> *The doubtful question presented is whether Congress, in providing that the right of action created by the Act "may be maintained in any court of competent jurisdiction," intended that an action, if brought in the state court, could be maintained there to final judgment, or intended merely that the action might be maintained in the state court if the defendant saw fit not to remove it. This question as to the intent of Congress has given the federal district courts much difficultly.*

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[2](Cases Omitted).

The result is that in some districts cases such as this may be removed and in other districts they may not be removed.[3] For this unfortunate situation the courts are not to blame. It is attributable to the failure of Congress clearly and accurately to express its intent. "To maintain an action or suit *may mean* to commence or institute it; the term imports the existence of a cause of action. * * * *Maintain,* however, is applied to *actions already brought, but not yet reduced to judgment.* * * *. In this connection it means to continue or preserve (persevere) in or with; to carry on. * * *" Black's Law Dictionary, 3rd Ed., 1143. The usual dictionary definition of the work "maintain" is: "To keep up or carry on (as, to maintain an action or undertaking); persevere in; prosecute; also, to keep in existence or continuance * * *."

[3] There can be no just criticism of those courts which have concluded that the language used by Congress was inadequate to disclose a clear intent that actions brought in a state court under the Act should not be removable. However, it is our opinion that Congress, in providing that an "*action to recover such liability may be maintained in any court of competent jurisdiction* * * *" and that "The court in such action shall, in addition to any judgment awarded to the plaintiff * * *, allow a reasonable attorney's fee * * * and costs * * *", intended not only that the action might be commenced in any court of competent jurisdiction, but that it could be prosecuted to final judgment in the court in which it was commenced. If that was not the intention of Congress, the

[3](Omitted 19 cases denying removability) (Omitted 8 cases sustaining removability).

words "may be maintained in any court of competent jurisdiction" *merely state a truism and are surplusage.* (Emphasis Added)

We think that the rational construction of section 16(b) is that contended for by the plaintiff and that it does no violence to the removal statute. If Congress intended, as we think it did, that cases such as this should not be subject to removal, *they are excepted from the effect of the removal statute,* which is neither impaired or repealed with respect to cases which properly come within its purview. (Emphasis Added).

There was nothing in the practical situation with which Congress was confronted when it enacted the statute in question which would negative an intent on its part to permit an employee to enforce his right of action in his local state courts. There are many obvious practical considerations which can be urged in support of the probable existence of such a Congressional intent.[4]

[4] Our conclusion is that the plaintiff has the right to prosecute his action to final judgment in the District Court of Crow Wing County, Minnesota, and that the United States District Court erred in preventing him from so doing.

(4) Cases of the post Johnson era

An examination of the case law will disclose that the district courts of the first, second, third, fourth, sixth and eighth Circuits have based their decisions on the ratio

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[4]Wingate v. General Auto Parts Co., D.C.W.D. Mo., 40 F. Supp. 364, 365; Booth v. Montgomery Ward & Co., D.C.D. Neb., 44 F. Supp., 451, 455, 456.

decidendi of *Johnson v. Butler Bros., supra; Wilkins v. Renault Southwest, Inc.,* D.C. Texas, 227 F. Supp. 647 (1964); *Zorrilla v. Puerto Rican Cement Co.,* D.C., Puerto Rico, 1964, 227 F. Supp. 159; *Maloy v. Friedman,* D.C. Ohio, 80 F. Supp. 290 (1948); *Carter v. Hill & Hill Truck Line, Inc.,* D.C. Texas, 259 F. Supp. 429 (1966); *Rolón v. Flexicore Company of Puerto Rico,* D.C. Puerto Rico, 216 F. Supp. 954 (1963); *Virgilio Avilés et al. v. Commanding Officer,* U.S. Army Command, Fort Buchanan, Puerto Rico, Civil No. 77-211, D.C. Puerto Rico (1977); *Bintrim v. Bruce Merilees Elec. Co.,* D.C. Pa., 520 F. Supp. 1026 (1981).

On the other hand some courts have ruled in favor of removal. See generally *Nishwander v. Paul Hardemann, Inc.,* D.C. Arkansas, 1963, 223 F. Supp. 74; *Buckles v. Morristown Kayo Co.,* D.C. Tenn., 1955, 127 F. Supp. 555; *Rossi v. Singer Sewing Mach. Co.,* D.C. Conn. 1954, 127 F. Supp. 53; *Asher v. William L. Crow Constr. Co.,* D.C. N.Y., 1953, 118 F. Supp. 495; *Hill v. Moss-American, Inc.,* 309 F. Supp. 1175, D.N.D. Mississippi, E.D., February 26, 1970.

(5) Wilkins v. Renault Southwest, Inc., D.C. Texas, 227 F. Supp. 647 (1964) has provided the basis to settle the confusion

The *Wilkins* case, *supra,* has provided the settling factor to the confusion initiated by the unsupported claim that enactment of Title 28 in 1948, as it renamed and reworded the old section 71 of the Code into its new designation as 1441, implied the revocation of the *Johnson Case.* To imply that the renaming and the rewording of section 71 into section 1441 revoked the ruling of the *Johnson Case* is far from being justified. The fact that enactment of the new section 1441 occurred a year after the *Johnson Case* is in no way detrimental to its validity as the Law of the Land until this Honorable Court determines otherwise. Section

71 was reworded and redesignated Section 1441 in the overall revision of Title 28 U.S.C. In 1948; but with the 1948 Amendment Congress intended to limit – not to extend – removability.[5]

The *Wilkins Case,* provides us with the irrefutable argument that Congress had considered section 216(b) of the FLSA as a prohibition against removal, hence Congress' inaction in not providing such prohibition in no uncertain terms. Proponents of the contrary view may argue that the reference to this prohibition is "*oblique reference*", *Hill v. Moss-American, Inc., supra,* but the fact remains that since July 11, 1958, to this day, no one has ever produced any 'best evidence' to the contrary. Reference to this prohibition in the *Wilkins case* is contained in 227 F. Supp. at 648, and is herein reproduced from *Senate Report* No. 1830, July 11, 1958, at page 3106, Legislative History, Second Session, 85th Congress, U.S. Code Congressional and Administrative News, 1958, as follows:

> "Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the *Fair Labor Standards Act,* and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, *the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court.* This proposed legislation accomplishes this same purpose and grants the same privilege to workmen who are entitled to compensation under the State workmen's act – that is, *the*

[5]American Fire & Gas Co. v. Fin (1951), 341 U.S. 6, 9-10.

workman has the option to file his case in either the Federal or the State court. If he files in the State court it is not removable to the Federal court." (Emphasis Added).

The arguments leading to, and those of the *Johnson Case* are as valid today as they were in 1947.

The decision against remand entered in the instant case by the USCA-1C contributes to accelerate the confusion prevailing, as it widens the abyss with the ruling of the 8th Circuit in the *Johnson Case.* The conflict between these two Circuits is reviewable under 28 U.S.C. 1254(1), 2101 (c) and rule 19(1)(a) and (b) of this Honorable Court.

Ruling for remand enhances the public policy behind the FLSA.

B. THE DISMISSAL OF THE SUPPLEMENTAL RIGHT OF ACTION UNDER 218(a) OF THE FLSA

The Appeals Court justified the dismissal of the supplemental claim under section 218(a) of the FLSA on the following:

(1) That the provisions of section 245, et seq. of Title 29 of the Laws of Puerto Rico Annotated (LPRA), minimum wages, and section 271, et seq., overtime hours, overtime rates do not apply to the federal employees in Puerto Rico because:

(a) Persons employed by the Government of the United States in Puerto Rico are specifically excluded from coverage of minimum wage provisions under 29 LPRA 246e.

(b) While statute is *silent* as to federal employees, exclusion from overtime provisions . . . federal employees *were intended* to be exempted as well, and the Department of Labor and Human Resources of the Commonwealth

saw "no reason" to include federal employes under the law while excluding Commonwealth employees. (Emphasis Added)

Petitioners most respectfully submit that the position of the Appeals Court is in error.

Title 29 of LPRA has two different and separate Chapters 11 for 29 LPRA 245-246m, to cover Minimum Wage, and 13 for 29 LPRA 271-299 to cover Days and Hours of Work.

The reasons for the separation in two chapters were predicated by the Congressional recognition of the depressed conditions of the economy of Puerto Rico upon enactment of the FLSA in 1938. Congress exempted Puerto Rico from compliance with the minimum wages established by the statute and authorized *lower wages* to be established by industry committees, 29 U.S.C. 206, under the jurisdiction of the state Labor Relations Board. Since the United States Government came under FLSA coverage in a piecemeal fashion, that is, the NAFI employer in 1966, Pub.L. 89-601,[6] and the rest of the United States Government in 1974, Pub.L. 93-259, *the government of Puerto Rico had to exempt,* under Chapter 11, 29 LPRA 246e(a)(2), "all persons working for the Government of the United States in Puerto Rico" *from coverage of the lower minimum wages of Puerto Rico because until 1966, the United States was totally immune from coverage of the FLSA.* In 1966 the NAFI employees were covered by minimum wage and overtime provisions of Section 218(b)(2)

---

[6]Section 203(d) of the FLSA also exempted Puerto Rico from coverage since 1938. The amendments of 1966 to the FLSA brought under coverage only employees of the Government of Puerto Rico who worked in a hospital, institution, or certain schools and operators a railway or carrier specified. *Historical note 29 U.S.C.A. 203(d), 1966 Amendments.*

of the FLSA, hence the Puerto Rican exclusion of the NAFIs from the lower minimum wage as part of the federal government, became inoperative by Congressional preemption of the field. The same situation repeated itself through the mandate of Congress in 1974, and the rest of the employees of the federal government fell out of the exclusion of the Puerto Rican law because of preemption of the field by Congress, and the minimum wage to apply is that of the FLSA. (Emphasis Added)

The exclusion was mandatory, not a mere grace of the Puerto Rican legislators.

In contrast with the case of *lower minimum wages* authorized to Puerto Rico by grace of Congress, the *base overtime rate* has been set always by Congress,[7] and *Puerto Rico has been free always,* since 1938, to establish higher overtime rates than those established by Congress in the FLSA by express authority of the "most beneficial" clause of section 218(a) of the FLSA, and Congress would not *excuse* non compliance with those higher overtime rates. Congress, in other words, has preempted the field as far as the *base overtime rate,* and Puerto Rico cannot exempt the NAFI employer since September 1966, and the rest of the persons employed by the rest of the Government of the United States in Puerto Rico, without clashing with the FLSA,[8] and Article VI, Clause 2, of the Constitution of the United States, since April 8, 1974, *Rogers v. Larson,* C.A. Virgin Islands, 1977, 563 F.2d 617, *cert. denied, appeal dismissed,* 439 U.S. 803, *Katherine Gibbs School, Inc. v. F.T.C.,* C.A. 1979, 612 F.2d 658, *rehearing denied,* 628 F.2d 755. This establishes the permanent

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[7]Section 207(a)(1) of the FLSA.

[8]Section 218(b)(2) of the FLSA.

overtime rate of the FLSA as a base rate applicable to the NAFI employer and to the employees. (Emphasis Added)

In respect to the supplemental overtime increment above the FLSA rate under the "most beneficial" laws of Puerto Rico,[9] these are applicable to the NAFI respondents and its employees because the 1966 Amendment to the FLSA equated the NAFI employer,[10] respondent in this case, with its counterpart *enterprise* in the non-military community. It is clear that they do not qualify as *industry* covered by the FLSA (and subject only to the FLSA overtime rate under the underlined proviso of 29 LPRA 274). The overtime rate payable by the NAFI respondent is twice the regular rate,[11] and this rate has been applicable to the private enterprise, the latter equated through the FLSA to the NAFI respondent since 1966, has been in effect for at least thirty-one years, *Laborde v. Eastern Sugar Associates,* 1959, 81 PRR 478; *Maldonado v. International Business Machines Corp.,* D.C. Puerto Rico, 1972, 56 F.R.D. 452, *Doctor's Hospital, Inc. v. Silva Recio,* D.C. Puerto Rico, 1975, 429 F. Supp. 560, affirmed 558 F.2d 619, 1977; *Webster v. Bechtel,* 1980, 621 P.2d 890; and *Peña v. Eastern Sugar Associates,* 1953, 75 PRR 288, affirmed 222 F.2d 934, certiorari denied, 350 U.S. 900 (1955).

---

[9]29 LPRA 285, fourth paragraph.

[10]Section 203(d), Employer. This Section remained intact with the Amendments of 1966 to the FLSA, with the exception of minor additions. No changes were introduced to distinguish the NAFI employer from its counterpart in the civilian economy. Historical Note 29 USCA 203(d), 1966 Amendment.

[11]The respondents sell merchandise and services; they do not produce goods; further, Mandatory Decree 47, revision of 1978, prepared by the Commonwealth of Puerto Rico under the authority of Section 206 of the FLSA, requires payment of overtime at twice the regular rate by enterprises as the NAFIs.

The base upon which the respondents base their claim of exemption, that is, 29 LPRA 246e(a)(2), is no longer available to them, and it was error for the Court of Appeals to dismiss the supplemental claim under 29 U.S.C. 218(a) on such basis. We know, and the Court so expressed, that section 246e(a)(2) is a minimum wage legislation in the Puerto Rican law. We further know that since February 19, 1985, with the case of *Joe G. García v. San Antonio Metropolitan Transit Authority, et al.*, 53 LAW WEEK 4135, 105 S. Ct. 1005 (1985), the government of Puerto Rico is no longer exempt from payment of minimum wages. Hence to brandish that obsolete law to claim "intent" in 29 LPRA 285 is to force an argument invalid from the very source.

Further, to legislate to include the United States in Section 285 of Chapter 13 of Title 29 of LPRA is a responsibility of the Legislature of the Commonwealth, and to legislate by inference or otherwise by Courts, or by individuals in positions of the Executive Branch to accomplish the same, is a violation to the separation of powers, which was so vehemently repudiated by the forefathers of the Constitution of the Land. The "silence" referred to by the Court of Appeals was forced upon the legislator of Puerto Rico by express mandate of Congress in the FLSA, there being no silence in 29 LPRA 285 to interpret.

CONCLUSION

a. That the U.S. Court of Appeals for the First Circuit erred as it affirmed removal of this case as authorized by the District Court for the District of Puerto Rico, in violation of law and jurisprudence.

b. That the U.S. Court of Appeals for the First Circuit erred when it affirmed dismissal of the supplemental cause

of action of petitioners under the "most beneficial" laws of Puerto Rico as authorized by the FLSA under Section 218(a).

WHEREFORE for the foregoing reasons, and as a matter of public policy, this Honorable Supreme Court should reverse the decision of the U.S. Court of Appeals for the First Circuit and remand the case to the Superior Court of Puerto Rico with instructions to apply the "most beneficial" laws of Puerto Rico authorized by Section 218(a) of the FLSA.

At San Juan, Puerto Rico, this 31st day of May, 1986.

/s/ Samuel C. Vazquez Matias
SAMUEL C. VAZQUEZ MATIAS
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June 12, 1986

85 - 2045

Supreme Court, U.S.
FILED
JUN 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

IN RE

ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, AND LORRAINE GORSKI,

Petitioners

v.

COL. ROBERT C. DESHLER, C.O. FORT BUCHANAN, COL. CLARENCE H. WOLLIVER, C.O. FORT McPHERSON, GA., INSTALLATION CLUB SYSTEM, NON-COMMISSIONED OFFICERS' OPEN MESS, AND/OR COMMUNITY CLUB, Sub-divisions of the INSTALLATION CLUB SYSTEM, Fort Buchanan, Puerto Rico,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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May 31, 1986

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58pp

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APPENDIX A

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

ANGEL M. COSME NIEVES	*	
SECUNDINO MACHADO, TOMAS	*	Civ. # PE
GARCIA, LORRAINE GORSKI	*	82-1381 1001
Complainants	*	IN RE:
vs.	*	Salaries claim
COL. ROBERT C. DESHLER, C.O.	*	
FORT BUCHANAN, INSTALLATION	*	
CLUB SYSTEM, NON-COMMISSIONED	*	
OFFICERS OPEN MESS, OFFICERS	*	
OPEN MESS, AND/OR COMMUNITY	*	
CLUB, Sub-divisions of the	*	
INSTALLATION CLUB SYSTEM,	*	
FORT BUCHANAN, PUERTO RICO,	*	
COL. CLARENCE H. WOLLIVER,	*	
C.O., FORT McPHERSON, GA.	*	
Defendants	*	

COMPLAINT

TO THE HONORABLE COURT:

Comes now captioned complainants through the subscribing counsel and before this Honorable Court very respectfully state, allege and request:

1. That complainants file the present complaint pursuant to the summary procedure established for this type of claims by Act No. 2 of October 17, 1961, 32 L.P.R.A. 3118 to 3132. The provisions of the 1938 Federal Statute on Reasonable Working Norms, as amended, 298 USCA 201 et seq, apply in the defense of their rights and all the laws of Puerto Rico, of greater benefit, specifically but not limited to Act 379 of May 15, 1948, as amended 29 L.P.R.A. 271 et seq. and Act 96 of June 26, 1956, as amended, 29 L.P.R.A. 245 et seq.

2. That in this case there is no monetary claim against the United States of America, and therefore the judgment to be obtained shall not come from the monies of the Treasury of the United States, and the appearance of Commanding Officer of Fort Buchanan, Col. ROBERT C. DESHLER, and that of Commanding Officer of Fort McPherson, Georgia, Col. CLARENCE H. WOLLIVER as respondents in this suit is due to the deference extended to them, since they are the ultimate custodians of the documents that are to be kept by the rest of the defendants who are persons exempt from immunity, that operate with non-appropriated funds from the Congress of the United States.

3. That the entity or entities, person or persons, other than the two mentioned above, operate one bar or more than one bar, one restaurant or more than one, one or more dancing halls, with facilities for banquets and parties, as well as a division for the sale of liquors, keeping a volume of business in excess of $500,00 per year. As of December 31, 1979, they reporeted a capital growth of $1,656,936.26 over the capital reported as of December 31, 1978 of $6,613,267.44 for a reported total of $8,270,203.70.

4. That this complaint covers the years between June 15, 1972 up to date, and during each of the years included in this complaint, the complainants worked, according to each particular case, in excess of eight (8) hours during a 24 hours period, during the rest period of 16 hours, during the hour for the intake of food, and at time in excess of 40 hours of work per week, and that defendants did not pay complainants for the rendered working hours, as provided by law and at times did not pay complainants any payments for the worked hours. Complainants at times used

accrued vacations hours to complete the minimum of worked hours guaranteed to the worker specifically affected, without previous consent of the worker.

5. That complainant ANGEL M. COSME NIEVES was employed by defendants since approximately June 15, 1972 until approximately October 18, 1981, and according to his best information and belief, defendants owe him an amount not lesser than $20,439.20 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $40,878.40.

6. That complainant SECUNDINO MACHADO has been employed by defendants since approximately July 14, 1973 up to date and according to his best information and belief, defendants owe him an amount not lesser than $11,572.86 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $23,145.72.

7. That complainant TOMAS GARCIA was employed by the defendants since approximately February 23, 1973 up to approximately February 21, 1981, and according to his best information and belief, defendants owe him an amount not lesser than $16,390.40 for unpaid salaries and an equal amount for penalties or liquid damages, which make a total of $32,780.80.

8. That complainant LORRAINE GORSKI has been employed by defendants since approximately November 4, 1977, up to date and according to her best information and belief, defendant owe her an amount no lesser than $10,106.20 for unpaid salaries and an equal amount for penalties or liquid damges which make a total of $20,212.40.

9. That complainants have claimed from defendants

the payment of the herein claimed salaries, but without any positive result whatever.

IN WITNESS WHEREOF it is very respectfully requested from this Honorable Court that after due legal steps, judgment be issued against defendants for an amount not lesser than $58,508.66 for unpaid salaries and an equal amount for penalties or liquid damages for a total of $117,017.32 up to date, accruing the amount of $57.14 per week, and an equal amount for penalties or liquid damges in favor of the two employees who are still working for defendants, until the final adjudication of this complaint. It is also requested that defendants be sentenced to pay legal interests since the filing of this complaint until its final adjudication, in addition to costs, expenses and a reasonable amount for lawyers fee.

CERTIFICATION: I hereby Certify that at the date of filing I have notified a copy of this Complaint to the Honorable Secretary of Labor, at his address in Hato Rey, Puerto Rico 00919.

In San Juan, Puerto Rico, October 9, 1982.

(sgd.) SAMUEL C. VAZQUEZ MATIAS
GPO Box 1218
San Juan, P.R. 00936

Enclosures: Sworn Statement authorizing this complaint

CERTIFIED:
To be a correct translation prepared by:
/s/ [Illegible] 3-28-83
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN PART

ANGEL M. COSME NIEVES	•	
SECUNDINO MACHADO, TOMAS	•	Civ. # PE
GARCIA, LORRAINE GORSKI	•	82-1381 1001
Complainants	•	IN RE:
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COL. ROBERT C. DESHLER, C.O.	•	
FORT BUCHANAN, INSTALLATION	•	
CLUB SYSTEM, NON-COMMISSIONED	•	
OFFICERS OPEN MESS, OFFICERS	•	
OPEN MESS, AND/OR COMMUNITY	•	
CLUB, Sub-divisions of the	•	
INSTALLATION CLUB SYSTEM,	•	
FORT BUCHANAN, PUERTO RICO,	•	
COL. CLARENCE H. WOLLIVER,	•	
C.O., FORT McPHERSON, GA.	•	
Defendants	•	

SWORN STATEMENT

WE, ANGEL M. COSME NIEVES, SECUNDINO MACHADO, TOMAS GARCIA, LORRAINE GORSKI, all of legal age, married to their respective spouses, excepting the last one who is single by divorce, employees and residents of Cataño, Carolina, Santurce and Río Piedras, of the municipality of San Juan, Puerto Rico, under oath state:

1. That our names and other personal circumstances are as stated above.

2. That we have read the complaint, of which this statement is to form an integral part thereof, and everything stated therein is of our own knowledge, excepting what is based in information and belief, which we also think is true in good faith.

3. That as consequence of the preceding paragraph, we

have authorized counselor SAMUEL C. VAZQUEZ MATIAS to file said complaint against the captioned defendants in claim of salaries, as well as to represent us in all the proper procedures for the final adjudication of said complaint.

4. That spite of the fact that counselor SAMUEL C. VAZQUEZ MATIAS has not requested payment, contribution or compensation from us to take this complaint up to its final adjudication, we bind ourselves, provided employer pays us, to help if necessary to defray the necessary expenses to initiate, continue and terminate the required procedures until the final adjudication of the complaint, including but not limited to, the expenses for depositions, the use of experts and their assistants regarding their services, the utilization of those services, inside as well as outside the hearings or meetings that might be necessary, within or without the Court, their hiring for the investigation of payrolls, cards and other documents pertinent to the salaries claim herein filed, as well as in the preparation and final presentation of the evidence or reports at the trial before the Court, or before the forum, agency or place where this complaint be finally adjudicated.

5. That Colonel Clarence H. Wolliver, co-defendant in this Complaint, even though no monetary claim is made against him or against the United States of America, is the final custodian along with Colonel Robert C. Deshler, Commandant of Fort Buchanan, Puerto Rico, of the documents that should be kept by the instrumentality not protected by the Principal, INSTALLATION CLUB SYSTEM, of Fort Buchanan.

6. That in addition to the above, Colonel Clarence H. Wolliver, Commandant of Fort McPherson, Georgia, in his character with authority over the INSTALLATION

CLUB SYSTEM of Fort Buchanan, Puerto Rico, has conducted businesses in Puerto Rico, through his agent and second in command in Fort Buchanan, Puerto Rico, Colonel Robert C. Deshler, allowing the actions that gave rise to this complaint and therefore, Colonel Clarence H. Wolliver, resident of the state of Georgia, is liable to be summoned by edict, and this sworn statement shall serve not only to authorize the complaint but also to request that Colonel Clarence H. Wolliver be summoned by edict.

7. That as can be seen from the complaint and from what shall be alleged further on, the complainants have a just cause against the defendants and the summons by edict of Colonel Clarence H. Wolliver, Commandant of Fort McPherson, Georgia, allows us to bring under the jurisdiction of the Court said appropriate party.

8. That during each and everyone of the years included in the complaint, of which this statement is to form a part thereof, the undersigned complainants worked, according to our particular case, in excess of eight (8) hours n a period of continuous 24 hours, during the rest period of sixteen (16) hours in twenty-four, during the hours of food intake and at time in excess of forty (40) hours in a work week, and defendants did not pay undersigned complainants, according to each particular case, for the rendered worked hours, as provided by law, and at times no payment was made for the worked hours. The defendant-employer at times used accrued vacations hours to complete the minimum of work guaranteed to the worker specifically affected, without the worker's previous consent. At time the defendant-employer paid in compensatory time the hours worked in excess of eight (8) in one day or forty (40) hours in one week, or worked during a legal holiday or during the seventh day.

9. That at other times the defendant-employer only allowed the worker-complainant to work part of the guaranteed term which was an amount of specified hours per week, and did not pay the maximum of guaranteed hours.

10. That employer was requested the payment of salaries claimed in this complaint, and that employer-defendant ignored our payment request.

IN WITNESS WHEREOF, we swear and sign this statement in San Juan, Puerto Rico, October 9, 1982.

(sgd.) ANGEL M. COSME NIEVES
(sgd.) LORRAINE GORSKI
(sgd.) SECUNDINO MACHADO
(sgd.) TOMAS GARCIA

OATH

Affidavit No. 1442

SWORN AND SUBSCRIBED before me by ANGEL M. COSME NIEVES, SECUNDINO MACHADO, LORRAINE GORSKI and TOMAS GARCIA, all of whom are of legal age, married to their respective spouses, employees and residents of Cataño, Río Piedras, and Santurce, Puerto Rico, respectively from left to right, and as to the civil status of LORRAINE GORSKI, who is single by divorce, and they so have expressed today October 9, 1982, in San Juan, Puerto Rico.

(sgd.) ILLEGIBLE
Notary Public

CERTIFIED:
To be a correct translation prepared by:
(sgd.) [Illegible] 3-28-83
Official Court Interpreter and Translator
United States District Court
for the District of Puerto Rico

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

ANGEL M. COSME NIEVES, et al, Plaintiffs	)	
v.	)	CIVIL NO. 83-0196 (PG)
COL. ROBERT C. DESHLER, CO., FORT BUCHANAN, et al, Defendants	)	

OPINION AND ORDER

This matter is before the Court upon the motion of plaintiffs to remand this case to the state court.

On October 13, 1982, plaintiffs filed this action in the Superior Court of the Commonwealth of Puerto Rico. Plaintiffs allege in the complaint that the defendants did not pay minimum and overtime wages, in violation of the Fair Labor Standards Act, (hereinafter FLSA) 29 U.S.C. 201, et seq., and some state statutes. Subsequently, on February 4, 1983, defendants removed the case to this Court pursuant to the provisions of 28 U.S.C. 1441(a) and (b), 1442, 1442(a) and 1446. On February 16, 1983, plaintiffs filed a motion to remand this case to the state court. On April 4, 1983, defendants filed an opposition thereto, which plaintiffs replied on April 8, 1983. The matter is now before the Court for an appropriate disposition of plaintiffs' motion to remand.

In support of their motion to remand plaintiffs contend that actions under the FLSA, 29 U.S.C. 216, may not be removed to the federal court, citing *Rolón* v. *Flexicore Company of Puerto Rico,* 216 F.Supp. 954 (D.C.P.R.,

1963); *Virgilio Avilés, et al* v. *Commanding Officer, U.S. Army Command, Fort Buchanan, Puerto Rico,* Civil No. 77-211; *Zorrilla* v. *Puerto Rican Cement Co.,* 227 F.Supp. 159 (D.C.P.R., 1964); and *Bintrim* v. *Bruce Meriless Electric Co.,* 520 F.Supp. 1026 (D.C.Pa., 1981). Plaintiffs further allege that the case is not removable under Sections 1442 and 1442(a) because there is no claim against any federal officer nor against the United States of America. Defendants in their motion in opposition to the motion to remand assert that the removal of this action is authorized by 28 U.S.C. 1441(a) and (b) and may also be removed pursuant to 28 U.S.C. 1442 and 1442(a). For the reasons which follow, the Court concludes that the case was properly removed pursuant to 28 U.S.C. 1441(a) and (b).[1]

Section 216(b)) of the FLSA provides that an action under the FLSA ". . . may be maintained in any court of competent jurisdiction." With respect to this provision, cases in other jurisdictions are in conflict. Neither the Supreme Court nor the First Circuit Court of Appeals have ever ruled on this issue of removability. The District Court of Puerto Rico in *Carrero* v. *M.S. Kaplan Co.,* 161 F.Supp. 754 (D.C.P.R., 1958) held that an action under the FLSA being a civil action of which the federal district court had original jurisdiction, the same was removable pursuant to 28 U.S.C. 1441(a). Subsequently, in *Rolón, et al* v. *Flexicore Co. of Puerto Rico, Inc., supra,* the Court was of the opinion that the *Carrereo* case misconstrued the language of Section 216(b) of Title 29, U.S.C.A., and that therefore the ruling in that case was incorrect and should not be followed. In *Zorilla* v. *Puerto Rican Cement Co., supra,* the court followed the ruling of the *Rolón* case that

[1]Since we reach this conclusion, it is not necessary to decide whether the case may also be removed under 28 U.S.C. 1442 and 1442(a).

an action under the FLSA is not removable from the state court to the federal court.

The issue has been presented on only one occasion at the appellate level. In *Johnson* v. *Butler,* 162 F.2d 87 (8 Cir., 1947), the court's decision that actions under the FLSA were not removable was based on the language ". . . may be maintained . . .", 29 U.S.C. 216(b), which it interpreted as not only granting the plaintiff the right to file his action in state courts, but also the right to prosecute the action to final judgment in that court. Less than a year after the *Johnson* decision, Congress amended Section 1441(a) to provide that civil actions may be removed "(e)xcept as otherwise expressly provided by Act of Congress. . .", 28 U.S.C. 1441(a). Subsequent to the 1948 amendment to Section 1441(a), few courts have continued to follow the *Johnson* rationale that the use of the term "maintain" in Section 216(b) constitutes an express provision against removal under the FLSA. Among those that have followed the *Johnson* reasoning are the *Rolón* and *Zorilla* cases. However, the growing majority is against interpreting the concurrent jurisdiction clause of the FLSA to prohibit removal because Section 1441 requires an express statement to that effect in the federal statute, e.g., *Hill* v. *Moss-American, Inc.,* 309 F.Supp. 1175 (N.D.Miss., (1970); *Anthony* v. *West Coast Drug Co.,* 331 F.Supp. 1279 (W.D.Wash., 1971); *Niswander* v. *Paul Hardeman, Inc.,* 223 F.Supp. 74, 76 (E.D.Ark., 1963); *Jacobi* v. *High Point Label, Inc.,* 442 F.Supp. 518 (M.D.N.C., 1977); *Taylor* v. *Brown,* 461 F.Supp. 559 (E.D.Tenn., 1978). The Court concludes that the better reasoned position is the one followed by the majority. Thus, it being that this civil action is one over which the Court has original jurisdiction under Title 28 U.S.C.A 1337 and under Section 16(b) of

the FLSA (29 U.S.C.A. 216(b))[2] and over which defendants had the right to remove to this Court pursuant to 28 U.S.C.A. 1441(a) and (b), plaintiffs' motion to remand should be denied.

In view of the above, the Court ORDERS that plaintiffs' motion to remand be and is hereby DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, April 15, 1983.

(sgd.) Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

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[2]Section 218(b)(2) of the FLSA, Title 29 U.S.C., permits a wage claim against non-appropriated fund instrumentalities such as defendants' herein. See *Morales* v. *Senior Petty Officers' Mess*, 366 F.Supp. 1305 (D.C.P.R., 1973).

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1351. Orig.

IN RE

ANGEL M. COSME NIEVES, ET AL.,
Petitioners.

BEFORE CAMPBELL, *Chief Judge,*
COFFIN AND BOWNES, *Circuit Judges.*

ORDER OF COURT

Entered August 22, 1983

No exceptional circumstances exist which warrant disregarding the policy against piecemeal appellate review. *See Ex parte Harding,* 219 U.S. 363 (1911); *Poirrier* v. *Nicklos Drilling Co.,* 648 F.2d 1063 (5th Cir. 1981). The possibility of relitigation is insufficient. *In re Continental Investment Corp.,* 637 F.2d 1, 5-6 (1st Cir. 1980). Consequently, the petition for a writ of mandamus or certiorari is denied.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1351. Orig.

IN RE

ANGEL M. COSME NIEVES, ET AL.,
Petitioners.

MEMORANDUM AND ORDER

Entered October 7, 1983

We adhere to our decision that the possibility of relitigation (should, after a trial on the merits, plaintiff prove correct on the removal issue) is insufficient to invoke the collateral order doctrine. We add that, in light of the fact that, in addition to the provision for interpreters, all the regular judges and jurors of the United States District Court are fully conversant in Spanish, we do not consider any difficulties encountered by Spanish speaking litigants to constitute exceptional circumstances justifying interlocutory review."

The request for reconsideration is denied.

By the Court:

Francis P. Scigliano
Clerk.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ANGEL M. COSME-NIEVES, et al,	)	
	)	
Plaintiffs	)	
	)	
v.	)	CIVIL NO.
	)	83-0196(PG)
COLONEL ROBERT C. DESHLER, CO., FORT BUCHANAN, et al.,	)	
	)	
	)	
Defendants	)	
	)	

OPINION AND ORDER

Present before the Court is defendants' motion to dismiss the claims of plaintiffs Angel M. Cosme-Nieves, Secundino Machado, Tomás García, and Lorraine Gorski, non-appropriated fund employees of the Fort Buchanan Installation Club System.

Plaintiffs commenced this action in the Superior Court of Puerto Rico, San Juan Part, on October 13, 1982. They seek to recover allegedly unpaid wages in the amount of $58,508.66 and liquidated damages in an equal amount. Plaintiffs also seek an unspecified amount in interest, costs, expenses and attorney's fees. Plaintiffs base their claims on the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq,* (hereafter "FLSA") and all laws of the Commonwealth of Puerto Rico providing greater benefits to employees. The defendants are Robert C. Deshler, Commanding Officer, Fort Buchanan; Colonel Clarence H. Wolliver, Commanding Officer, Fort McPherson, Georgia; the Fort Buchanan Installation Government of the United States and the Non-Commissioned Officer's Open

Mess and Officer's Open Mess, both subdivisions of the Installation Club System.[1]

On February 4, 1983, the defendants filed a Petition removing the case to this Court. On February 15, 1983, plaintiffs, by motion, requested remand to the Commonwealth Court. The Court denied plaintiffs' request to remand.[2]

Plaintiffs base this action on 29 U.S.C. § 218,[3] 29

[1]Since the inception of this suit, Colonel Deshler and Colonel Wolliver have been reassigned from their respective duty positions. They were both named as defendants in their official capacities.

[2]Plaintiffs sought a Writ of *Mandamus* or *Certiorari* from the United States Court of Appeals for the First Circuit to reverse the decision not to remand. It was denied. (1st Cir. August 22, 1983) (No. 83-1351). Plaintiffs requested the First Circuit to reconsider its decision, which was also denied. (1st Cir. October 7, 1983) (No. 83-1351).

[3]29 U.S.C. § 218 provides:

> (a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall jutify any employer noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard etablished under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.
>
> (b) Notwithstanding any other provision of this chapter (other than section 213(f) of this title) or any other law—
>
> (1) any Federal employee in the Canal Zone engaged in

U.S.C. § 216(b)[4] and the "more beneficial" laws of Puerto Rico.[5] The government moves to dismiss this action on the grounds that plaintiffs fail to state a claim upon which re-

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employment of the kind described in section 5102(c)(7) of Title 5, or

(2) any employee employed in an nonappropriated fund instrumentality under the jurisdiciton of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except) that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

[4]29 U.S.C. § 216(b) provides:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violate the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

[5]The "more beneficial" laws which plaintiffs submit are applicable are 29 L.P.R.A. § 273, 274.

lief may be granted and because the Court lacks subject matter jurisdiction.[6]

The government alleges that plaintiffs have failed to state a claim upon which relief may be granted for two reasons. First, the government submits that plaintiffs have failed to name a proper defendant. Second, the government challenges the applicability of the "more beneficial" laws of the Commonwealth of Puerto Rico concerning overtime compensation.

Both plaintiffs and the government agree that the proper defendant is the employer. The critical question is who is the employer under the FLSA. Plaintiffs repeatedly argue that under the FLSA, they have the option of choosing either the United States or the non-appropriated fund instrumentality, the Installation Club System, as the defendant. Plaintiffs also argue that the United States cannot be the defendant in this case. These diverse positions are inherently contradictory and not credible.

It is absolutely contradictory for plaintiffs to assert that under the same statutory provision the United States can and cannot be the employer and a proper defendant. Additionally, adding to the contradiction, plaintiffs further assert that the Installation Club System is also the employer under the FLSA. This means that plaintiffs had separate employers while performing indentical duties and receiving one paycheck. This is not realistically or logically supportable.

Plaintiffs contend that this Court's decision in *Morales*

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[6]In the alternative, the government contends that the statute of limitations as found in 29 U.S.C. § 255, barred all claims prior to October 13, 1980. Plaintiffs submit that there is a ten-year statute of limitations under 29 L.P.R.A. § 246(a)-(3). This issue need not be addressed in light of the Court's decision.

v. Senior Petty Officer's Mess, 366 F.Supp. 1305 (D.P.R. 1973), supports the position that the Installation Club System is the proper defendant. Plaintiffs' reliance on *Morales* is clearly misplaced. Plaintiffs' action here is based on 29 U.S.C. § 218(a). The Court in *Morales* was only concerned with 29 U.S.C. § 218(b)(2) and whether the United Staets had waived sovereign immunity for non-appropriated fund instrumentalities of the Armed Forces. More significantly, when *Morales* was decided in 1973, the United States was specifically excluded from the definition of the term "employer" under 29 U.S.C. § 203(d). Unquestionably, the 1974 amendments to the FLSA include the Government of the United States within the definition of "employer".

Under the FLSA, non-appropriated fund employees are employees of the Government of the United States. The plain language of 29 U.S.C. § 203(e) cannot be interpreted otherwise.[7] The United States as the employer is the pro-

[7] 29 U.S.C. § 203(e) provides in part:

> (e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means–
>
> (A) any individual employed by the Government of the United States –
>
> (i) as a civilian in the military departments (as defined in section 102 of Title 5),
>
> (ii) in any executive agency (as defined in section 105 of such title),
>
> (iii) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service,
>
> (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or
>
> (v) in the Library of Congress;

per defendant. Plaintiffs have failed to name the United States as the defendnat.

The government has also presented two exhibits with its Motion to Dismiss. These exhibits are letters from the Department of Labor and Human Resource for the Commonwealth of Puerto Rico concerning the applicability of Act No. 379 of 1948 and the mandatory decrees promulgated by the Minimum Wage Board under the authority of Act No. 96 of 1956 (Minimum Wage Law).[8] In both letters, it was the Department of Labor and Human Resources' position that the aforementioend Acts are not applicable to federal employees in Puerto Rico. The provisions of the laws of the Commonwealth of Puerto Rico concerning minimum wages specifically exclude persons employed by the Government of the United States and the Commonwealth of Puerto Rico.[9] Act No. 379, which contains the provisions establishing overtime and rates of overtime compensation, excludes employees of the Commonwealth Government and other governmental bodies.[10]

[8]The first letter is dated July 23, 1980, and is signed by the then Secretary for the Department of Labor and Human Resources, Carlos S. Quirós. The second lettrer is dated June 4, 1984, and is signed by Julio Cruz Rodríguez for the Solicitor of Labor.

[9]29 L.P.R.A. § 246e provides in part:

> (a) *This act shall not apply to:*
>
> (1) .....
>
> (2) *Persons employed by the Government of the United States of America* or by the Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises: . . . .

[10]29 L.P.R.A. § 285 provides in part:

> The provisions of this Act shall not apply to the employees of the Commonwealth Government, the Municipal governments, the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting

When the Commonwealth Government excludes itself and other entities from the application of Act No. 379 and twice expresses the opinion that Act No. 379 does not apply to federal employees, there is no justifiable basis for plaintiffs' assertion that the so-called "more beneficial" laws apply to federal employees. A responsible reading of the "more beneficial" laws, buttressed by the unequivocal opinon of the Department of Labor and Human Resources, leads the Court to the inescapable conclusion that plaintiffs do not have a cause of action under 29 U.S.C. § 218(a).

The government also contends that the Court lacks subject matter jurisdiction because the proper jurisditional basis for this action is the Tucker Act, 28 U.S.C. § 1346(a)(2).[11] This Court agrees.

As previously addressed, the proper defendant is the Government of the United States. Each plaintiff's claim is in excess of $10,000 in backpay and damages. Plaintiffs admit that this case arises under an Act of Congress. The Court's jurisdiction is limited under 28 U.S.C. § 1346(a)(2) to claims not exceeding $10,000 in amount.

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such agencies or instrumentalities as are devoted to agricultural, industrial, commercial or public-service enterprises.

[11] 28 U.S.C. § 1346(a) provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The United States Claims Court, under 28 U.S.C. § 1491, has exclusive jurisdiction over all non-tort claims against the United States for money damages in excess of $10,000. *Graham v. Henegar,* 640 F.2d 732, 734, nn. 5, 6 (5th Cir. 1981). It should be noted that plaintiffs admit the United States Claims Court has exclusive jurisdiction if plaintiffs "elected" to choose the United States as the defendant.[12] It is particularly disturbing that plaintiffs' counsel have extensively engaged the resources of the Court on the baseless conception that under the same statute plaintiffs can "elect" both defendants and forums.

In view of the above, the Court ORDERS that the Government's motion be and is hereby GRANTED and that this action be and is hereby DISMISSED.

The Court FURTHER ORDERS costs against plaintiffs.

IT IS SO ORDERED.

San Juan, Puerto Rico, January 8, 1985.

/s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
Chief U.S. District Judge

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[12]Plaintiffs' state in their voluminous opposing brief, at pp. 42, 43:

> Should the employees elect this option [suit against the United States]; then, they [plaintiffs] would be required to file with the Court of Claims. *This is an option which plaintiffs did not elect for obvious* reasons.

Plaintiffs' counsel also asserted that they did not sue the United States because they were not inclined or willing to do so. Such a cavalier attitude in bringing judicial actions is totally unacceptable.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ANGEL M. COSME-NIEVES, et al,	)	
	)	
Plaintiffs	)	
	)	
v.	)	CIVIL NO.
	)	83-0196(PG)
COLONEL ROBERT C. DESHLER, CO., FORT BUCHANAN, et al.,	)	
	)	
	)	
Defendants	)	
	)	

JUDGMENT

The Court having entered an Opinion and Order through the Hon. Juan M. Peréz-Giménez,

IT IS ORDERED AND ADJUDGED that this action be dismissed; and

IT IS FURTHER ORDERED AND ADJUDGED that costs be against plaintiffs.

SO ORDERED.

San Juan, Puerto Rico, January 14,1985.

/s/ Ramon A. Alfaro
RAMON A. ALFARO
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1095

ANGEL M. COSME NIEVES, ET AL.,

Plaintiffs, Appellants,

v.

COL. ROBERT C. DESHLER, ETC., ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Perez-Gimenez, *U.S. District Judge*]

[561 F. Supp. 1173 (1983)]

[601 F. Supp. 100 (1985)]

Before

Campbell, *Chief Judge,*

Coffin and Torruella, *Circuit Judges.*

Samuel C. Vazquez Matias with whom *Hector L. Marquez* was on brief for appellants.

Richard K. Willard, Assistant Attorney General, *David M. Cohen,* Director, and *Robert A. Reutershan,* Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, on supplemental brief for the United States.

Vincent E. Reilly, Office of the Judge Advocate General, Department of the Army, with whom *Francisco A. Besosa,* Assistant United States Attorney, and *Daniel F. Lopez Romo,* United Staes Attorney, were on brief for appellees.

March 18, 1986

CAMPBELL, *Chief Judge.* Plaintiffs-appellants Angel M. Cosme Nieves, Secundino Machada, Tomas Garcia, and Lorraine Gorski, all employees of defendant-appellee Fort Buchanan Installation Club System ("FBICS"), brought an action for back pay and damages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (1982), and the labor laws of Puerto Rico. They now appeal from the district court's dismissal of their action for want of jurisdiction and for failure to state a claim upon which relief could be granted. *Cosme Nieves* v. *Deshler,* 601 F. Supp. 100 (D.P.R. 1985). Plaintiffs also appeal from the district court's denial of their motion to remand the case to the Commonwealth courts. *Cosme Nieves* v. *Deshler,* 561 F. Supp. 1173 (D.P.R. 1983).

I.

Defendant FBICS operates the Commissioned Officers' Open Mess, the Non-Commissioned Officers' Open Mess, and the Package Beverage Branch at the Fort Buchanan military base in Puerto Rico.[1] All parties agree that FBICS is a non-appropriated fund instrumentality ("NAFI") of the Government of the United States; that is, its monies do not come from congressional appropriation but rather primarily from its own activities, services, and product sales. *See United States* v. *Hopkins,* 427 U.S. 123, 125 n.2 (1976) (per curiam); *Perez* v. *Army & Air Force Exchange Service,* 680 F.2d 779, 780-81 (D.C. Cir. 1982). It is also un-

[1]Each of these subdivisions is also named as defendant.

disputed that FBICS is under the jurisdiction of the Armed Forces.[2]

On October 13, 1982, plaintiffs filed the present action in the Sueprior Court of Puerto Rico seeking back pay in the amount of $58,508.66 and liquidated damages in an equal amount, as well as interest, costs, expenses, and attorneys' fees. Each plaintiff seeks from FBICS damages in excess of $10,000 for failure to have paid proper wages and overtime, in alleged violation of section 18 of the FLSA, 29 U.S.C. § 218 (1982), and also of certain supposedly more beneficial provisions of the laws of Puerto Rico, P.R. Laws Ann. tit. 29, § 245 *et seq.* & § 271 *et seq.* (1985).

Defendants removed the case to the United States District Court for the District of Puerto Rico on February 4, 1983. The district court denied plaintiffs' motion for remand to the superior court, and retained jurisdiction, finding that it had original jurisdiction of the action under 28 U.S.C. § 1337 (1982),[3] that removal had been proper under 28 U.S.C. § 1441(a) (1982),[4] and that there was no express provision prohibiting removal. On August 22, 1983, this court denied plaintiffs' petition for a writ of mandamus.

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[2]Colonel Robert C. Deshler, then present commanding officer of Fort Buchanan, and Colonel Clarence H. Wolliver, a past commanding officer of Fort Buchanan, are also defendants.

[3]28 U.S.C. § 1337 provides district courts with original jurisdiction over actions "arising under any Act of Congress regulating commerce," such as the FLSA. We note that jurisdiction could also be based on 28 U.S.C. § 1331 (1982), since a claim under the FLSA "arises under the Constitution, laws, or treaties of the United States . . . ."

[4]"Except as other expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . may be removed by the defendant or the defendants . . . ." 28 U.S.C. § 1441().

On January 14, 1985, the district court on defendants' motion dismissed the case for lack of jurisdiction and for failure to state a claim upon which relief could be granted. The court reasoned that the Government of the United States was plaintiffs' actual "employer," and hence was the only proper defendant in a suit brought under the FLSA. Moreover, the court found that because plaintiffs' individual claims each exceeded $10,000, federal jurisdiction over their claims lay exclusively in the United States Claims Court under 28 U.S.C. § 1491 (1982).[5] The court also determined that plaintiffs did not have a claim under section 218(a) of the FLSA and the Puerto Rico laws. This appeal followed.

In their original appellate briefs, and in oral argument before this court, defendants, represented by the office of the Judge Advocate General of the Department of the Army, urged us to affirm the district court's ruling that the United States was the proper defendant and that the Claims Court had exclusive jurisdiction over the suit. They further contended that exclusive jurisdiction over this appeal lay solely in the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295(a)(2) (1982) because the district court allegedly based its jurisdiction on 28 U.S.C. § 1346(a)(2) (1982).

Because it was unclear to us whether arguments being made on behalf of defendants on these arcane jurisdictional issues reflected the settled views of the federal government, rather than of simply the Department of the Army, we requested the Solicitor Genearl to file a sup-

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[5]District Courts have jurisdiction concurrent with the United States Claims Court over non-tort claims against the United States only if they do not exceed $10,000 in amount. 28 U.S.C. § 1346(a)(2) (1982).

plemental brief.[6] On December 13, 1985, the Department of Justice submitted on behalf of the United States a comprehensive brief which concedes, as plaintiffs have argued all along, that the NAFI is a proper defendant under the FLSA, and that the district court rather than the Claims Court has jurisdiction over this suit. Defendants have subsequently advised us that they now accept this position as their own. Hence the only issues remaining in contention betweeen the parties are whether the case was properly removed from the Superior Court of Puerto Rico to the federal district court, and whether certain rulings by the district court on the merits of plaintiffs' claims should be sustained.

II.

A. **Jurisdictional Issues**

While defendants no longer argue that this case should have been brought in the Claims Court as an action exclusively against the United States or that the Federal Circuit Court of Appeals has sole jurisdiction over this appeal, we must, of course, decide these issues for ourselves, since the parties cannot, by consent, confer jurisdiction on a court. *See, e.g., Sosna* v. *Iowa,* 419 U.S. 393, 398 (1975). After reviewing the government's supplemental brief and the relevant authorities with care, we accept the Attorney General's position on these issues. Accordingly, we reverse the district court's dismissal of plaintiffs' FLSA claims for lack of jurisdiction. We hold also that this appeal is properly before this court.

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[6]We noted in our request that "[b]ecause NAFI's are used throughout the military, as well as in other branches of government, we feel it important that this court be assured that it is receiving the considered view, formed at an appropriate level, of the Justice Department concerning the proper disposition of this case." We also pointed out that there were precedents from the former Court of Claims, not discussed in defendants' original brief, which seemed at variance with the position defendants were then taking.

The district court found, in keeping with the contentions then being urged by defendants, that the action was in effect a "claim against the United States founded . . . upon . . . [an] Act of Congress," and must therefore be presented to the Claims Court under the Tucker Act, since the claims exceeded $10,000 in amount. 28 U.S.C. § 1491(a).[7] At first blush, this analysis might seem to be correct. NAFIs, after all, are " '[a]rms of the federal government deemed by it essential for the performance of governmental functions' ";[8] and a claim for money damages against a federal instrumentality acting within its statutory authority is usually treated as an action against the United States, since the judgment, if any, must be paid from the public treasury. *See Dugan* v. *Rank,* 372 U.S. 609, 620 (1963); *Butz Engineering* v. *United States,* 499 F.2d 619, 621-23 (Ct. Cl. 1974) (citing cases). Moreover, because the FLSA defines the term "employee" as including "any individual employed by the Government of the United States" in, *inter alia,* a "nonappropriated fund instrumentality,"

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[7]The Tucker Act waives the sovereign immunity of the United States to suit and grants the Claims Court jurisdiction over,

> any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States . . . . For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchange, or Exchange Councils of the National Aeronautics and Space Administration . . . shall be considered an express or implied contract with the United States.

28 U.S.C. § 1491(a).

[8]*Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 733 (1982) (quoting *United States* v. *Mississippi Tax Comm'n,* 421 U.S. 599, 606 (1975)); *see also Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485 (1942).

29 U.S.C. § 203(e)(2)(A)(iv) (1982),[9] the district court could believe, as it did, tha the "real" employer under the FLSA was the United States rather than the NAFI by and for whom the employees were actually hired to work.

But while we can appreciate the district court's reasoning, we believe it was erroneous insofar as it was based on the premise that a district court lacks jurisdiction to entertain a FLSA action against a NAFI itself *and its nonappropriated funds* (which is the kind of action we construe this to be). Because NAFIs are supported by "nonappropriated" funds rather than monies from the public treasury, they constitute a special breed of federal instrumentality, which cannot be fully analogized to the typical federal agency supported by appropriated funds.

First, it has long been held that, absent special legislation, the federal government does not assume the financial obligations of a NAFI, as it does those of a federal agency funded in the usual way from congressional appropriations. *See Hopkins* v. *United States,* 427 U.S. 123, 127 (1976) (per curiam); *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485 (1942). As a consequence, because judgments rendered by the Claims Court can be paid only from appropriated funds, 28 U.S.C. § 2517(a) (1982), the Claims Court has held that it lacks jurisdiction to grant judgments against the United States in favor of NAFI

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[9] 29 U.S.C. § 203(e) provides in part:

> (1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.
>
> (2) In the case of an individual employed by a public agency, such term means –
>
> (A) any individual employed by the Government of the United States –
>
> (iv) in a nonappropriated fund instrumemtality under the jurisdiction of the Armed Forces . . . .

plaintiffs except in those instances where Congress has made special provision.[10]

Second, NAFIs are also special in that they are revenue-producing entities that take in and disburse funds generated by their own activities (here, we are told, primarily through the sale of food and beverages). Congress, in fact, has clearly expressed its intention that no appropriated funds be used to support NAFI activities, and thus that their "nonappropriated" funds be severed from general federal revenues. *See Hopkins,* 427 U.S. at 125; *Swiff-Train Co.* v. *United States,* 443 F.2d 1140, 1141 (1971).[11] Because NAFI funds, therefore, have an identity apart from that of treasury funds, NAFIs may be subject to claims directly against them and their nonappropriated assets, as distinct from claims against the United States and the public fisc. *See Rivera* v. *Installation Club System,* 623 F. Supp. 269 (D.P.R. 1985) (permitting suit against NAFI itself).[12]

Apparently relying on the foregoing special characteristics of NAFIs, the Attorney General, in his supplemental brief, has abandoned defendants' earlier position that the

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[10]*See, e.g., McCloskey & Co.* v. *United States,* 530 F.2d 374 (Ct. Cl. 1976); *Kyer* v. *United States,* 3698 F.2d 714 (Ct. Cl. 1966), *cert. denied,* 387 U.S. 929 (1967); *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964).

[11]*Compare L'Enfant Plaza Properties, Inc.* v. *United States,* 668 F.2d 1211, 1212 (Ct. Cl. 1982) (holding that a suit against a financially self-sufficient agency, where governing legislation does not preclude congressional appropriations, is a suit against the United States); *Breitbeck* v. *United States,* 500 F.2d 556, 559 (Ct. Cl. 1974) (holding that a suit against a self-supporting federal corporation where there is no "clear cleavage" between its funds and those of the United States is a suit against the United States).

[12]*Cf. Industrial Indemnity, Inc.* v. *Landrieu,* 615 F.2d 644, 646 (5th Cir. 1980) (per curiam) (permitting suit against Secretary of HUD rather than the United States, where statute provided for such a suit and any judgment was recoverable from *separate* funds in the Secretary's possession and control) (citing cases).

action lay exclusively against the United States, contending now that it was proper for plaintiffs to have sued the employing NAFI itself, to the extent of its nonappropriated funds. In taking this position, the Attorney General points out that the FLSA provides that actions "may be maintained against *any employer (including a public agency) in any Federal or State court of competent jurisdiction.*" *29 U.S.C.* § 216(b) (1982) (emphasis added). *See also* 29 U.S.C. § 203(d) (1982) (an "employer" includes a "public agency").[13] Since a NAFI meets this definition of a public agency employer, the Attorney General asserts that, in the absence of Tucker Act jurisdiction, the NAFI is suable in its own name and right with respect to its nonappropriated funds. Indeed, the Attorney General announces in his supplemental brief that "if this case is transferred to the Claims Court, [the government] will take the position that that court does not have jurisdiction over this case."

Given the Attorney General's view that A NAFI is suable in its own right, and given the precedents indicating that it would, at very least, be an uphill battle to sue the United States in the Claims Court for alleged violations of the FLSA, we hold that it was error for the district court to dismiss on the ground that plaintiffs were obliged to have brought this action in the Claims Court against the United States. In so saying, we stop short of deciding whether a Claims Court action against the United States might have been possible, given the fact that the FLSA waives the sovereign immunity of the United States to suit by its employees and that NAFI employees are described in the

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[13]Act of April 8, 1974, Pub. L. No. 93-259, § 6(a)(1), 1974 U.S. Code Cong. & Ad. New (88 Stat.), 55, 59. An "employer" is currently defined to

> include [ ] any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency . . .

29 U.S.C. § 203(d) (1982).

FLSA as being employed by the United States government. We hold only that plaintiffs are entitled to proceed in the district court against their immediate employer, the NAFI itself, to the extent of its nonappropriated funds.

In reaching this result, we agree with the Attorney General that jurisdiction for the district court to hear this action is to be found in 28 U.S.C. § 1331 (federal question). *See also* 28 U.S.C. § 1337.[14] The Claims Court, to be sure, has exclusive jurisdiction under the Tucker Act over money claims exceeding $10,000 if brought against the United States, *see* 28 U.S.C. § 1491(a);[15] *see also Doe* v. *United States Department of Justice,* 753 F.2d 1093, 1101 (D.C. Cir. 1985); *Graham* v. *Henegar,* 640 F.2d 732, 734-35 (5th Cir. 1981); *American Science & Engineering, Inc.* v. *Califano,* 571 F.2d 58, 62 (1st Cir. 1978). This claim, however, is brought against the NAFI itself and its nonappropriated funds and, as already explained, the NAFI is not a mere incarnation of the United States but, having separate "nonappropriated" funds of its own, is to that degree a separate, suable entity. This case does not fit, moreover, within the limited exception in the Tucker Act permitting actions based on contracts with certain NAFIs to be treated as claims against the United States.[16] Hence,

[14]*See* note 3 *supra.*

[15]For the text of 28 U.S.C. § 1491(a), see note 7, *supra.*

[16]The Tucker Act was amended in 1970 to state that an express or implied *contract* with the NAFIs specifically named in section 1491(a) should be considered an express or implied contract with the United States, allowing suits on such contracts to be brought in the Court of Claims. *See* Pub. L. No. 91-350, 84 Stat. 449. For text, see note 7, *supra.* But as the government's brief points out, "[n]othing in the language of the . . . amendment or its legislative history gives any indication that . . . Congress had any intention to allow Tucker Act actions by NAFI employees based upon the Constitution, an Act of Congress, or a regulation or an executive department . . . ." A FLSA action is one based upon an Act of Congress, not upon a contract and the NAFI defendant here is not one of the NAFIs to which the Tucker Act exception applies.

we accept the Attorney General's view that there is no reason to deprive the district court of its ordinary jurisdiction under 28 U.S.C. §§ 1331 or 1337. In the FLSA the United States has clearly waived the sovereign immunity of federal agencies, icluding NAFIs, to suit by their employees. *See* 29 U.S.C. § 216(b);*Zumerling* v. *Devine,* 769 F.2d 745, 748 (Fed. Cir. 1985). We therefore conclude that this action may be maintained in the district court against the NAFI.

It also follows that this appeal is correctly before this court rather than before the United States Court of Appeals for the Federal Circuit as defendants once contended (*viz.*, before rethinking their position in light of the Attorney General's supplemental brief). The Federal Circuit Court has sole jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiciton of that court was based, in whole or in part, on section 1346 of [title 28 of the United States Code] . . . ." 28 U.S.C. § 1295(a)(2). Here, since the claims exceeded $10,000 in amount, district court jurisdiction could not possibly be based on section 1346(a). The district court so recognized, but then went on to determine, erroneously we now believe, that the United States Claims Court had exclusive jurisdiction under 28 U.S.C. § 1491. As we must reject the existence of exclusive Claims Court jurisdiction, *see supra,* and instead find jurisdiction in the district court under 28 U.S.C. § 1331 and § 1337, it follows that section 1295(a)(2) is irrelevant to this appeal, which is properly in our court under 28 U.S.C. § 1291.

B. **Removal of Case**

Plaintiffs continue to assert that the district court should have remanded the case back to the Commonwealth courts since Congress intended to bar the removal

of cases arising under the FLSA. In support, they rely principally on the particular phrasing in the Act that a FLSA suit "*may be maintained* in any Federal or State court of competent jurisdiction." 28 U.S.C. § 216(b) (emphasis added). Plaintiffs assert that the use of "maintained" means not simply that state and federal courts share concurrent jurisdiction over FLSA suits but also that Congress intended that any FLSA action begun in a state (or Commonwealth of Puerto Rico) court be concluded there.

It is true that prior to 1948 the one circuit court that addressed the issue found the language significant and held that Congress intended to prohibit the removal of FLSA actions. *See Johnson* v. *Butler Brothers,* 162 F.2d 87 (8th Cir. 1947). In 1948, however, Congress amended the general removal statute to provide that civil actions may be removed "[e]xcept as otherwise *expressly provided* by Act of Congress." 28 U.S.C. § 1441(a) (emphasis added). While courts remain split, the weight of subsequent case law is in favor of permitting FLSA cases begun in state courts to be removed to the federal courts pursuant to the authority contained in section 1441(a).[17] *See generally* 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure,* § 3729, at 496-97 nn.56-57 (2d ed. 1985) (collecting cases); Annot., A.L.R. Fed. 919 (1972 & Supp. 1985).

As the first circuit court to face this issue since the 1948 amendment, we find ourselves in agreement with those district courts that have allowed removal. Section 1441(a)

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[17]District Courts in Puerto Rico have adopted the position favoring removal, *see Zorrilla* v. *Puerto Rican Cement Co.*, 2278 F. Supp. 159 (D.P.R. 1964); *Rolon* v. *Flexicore Co.*, 216 F. Supp. 954 (D.P.R. 1963), as have district courts in the Second Circuit, *see Sicinski* v. *Reliance Funding Corp.*, 461 F. Supp. 649 (S.D.N.Y. 1978); *Asher* v. *William L. Crow Construction Co.*, 118 F. Supp. 495 (S.D.N.Y. 1953).

explicitly states than an express provision by Act of Congress is required to preclude the right to removal. We think the words "expressly provided" must be construed to mean exactly that. *See Pueblo International, Inc.* v. *DeCardona,* 725 F.2d 823, 827 (1st Cir. 1984). Lacking an explicit statutory directive by Congress that the customary right to remove is abrogated in the instance of FLSA suits,[18] we decline to prohibit their removal. The words "may be maintained" are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal. If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms,[19] and it could easily have done so here.

We are aware that sensible policy arguments can be made against the removal of FLSA suits, although reasonable arguments the other way can also be marshalled. *See Sicinski* v *Reliance Funding Corp.,* 461 F. Supp. 649 (S.D. N.Y. 1978); *Hill* v. *Moss-American, Inc.,* 309 F. Supp. 1175, 1178 (N.D. Miss. 1970). But Congress has made it plain that the right of removal is to stand absent an express

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[18]In support of their argument that removal is prohibited, plaintiffs point to a statement in the Senate Committee report to Pub. L. No. 85-544 that "Congress itself has recognized the inadvisability of permitting removal of cases" arising under such laws as the FLSA. *See* S. Rep. No. 1830, 85th Cong., 2d Sess. 9, *reprinted in* 1958 U.S. Code Cong. & Ad. News 3106. But the amendment under discussion involved 28 U.S.C. § 1445, making state workmen's compensation cases non-removable, and neither 28 U.S.C. § 1441 nor 29 U.S.C. § 216(b) is mentioned or affected by the amendment. At best the statement is no more than an "oblique reference" without any documentation whatever. *See Hill* v. *Moss-American, Inc.,* 309 F. Supp. 1175, 1177 n.6 (N.D. Miss. 1970).

[19]*See, e.g.,* 28 U.S.C. § 1445 (1982) (certain actions against railroads arising under state workmen's compensation laws); 15 U.S.C. § 77v(a) (1982) (actions under Securities Act of 1933).

provision to the contrary, and it is the responsibility of Congress, not of the courts, to speak on the matter if it wishes to foreclose removal of FLSA cases. We hold, therefore, that since the district court has original jurisdiction of the suit, and nothing in the FLSA or the general removal statute expressly prohibits the removal of FLSA actions, the case was properly removed pursuant to 28 U.S.C. § 1441.

C. FLSA Claims

Plaintiffs also assert that the district court erred in dismissing their claim to back pay and damages under certain Puerto Rico provisions which are allegedly "more beneficial" than the FLSA. In their view, section 218(a) of the FLSA, which permits states to adopt higher standards than those established by the Act,[20] grants plaintiffs as a matter of federal law the benfits of any existing Commonwealth laws that are more favorable to them. The district court rejected this argument on the grounds that the Puerto Rico laws upon which plaintiffs rely exempt federal employees from coverage, and that therefore plaintiffs did not have a cause of action under section 218(a). We agree.

First, we find plaintiffs' reliance on section 218(a) misplaced. Section 218(a) simply makes clear that the FLSA does not preempt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute. It does not purport to incorporate

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[20] 29 U.S.C. § 218(a) (1982) provides in part that:

> No provision of [the FLSA] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this [Act].

existing state law; and it certainly does not guarantee plaintiffs, as employees covered by the FLSA, the benefit of more favorable Puerto Rico laws that do not of their own force apply to federal employees. In order to prevail, plaintiffs cannot simply invoke section 218(a) but must also show that the more beneficial Commonwealth provisions actually apply to them. This they have failed to do.

Plaintiffs claim they are owed back pay under two sets of Puerto Rico provisions — title 29, section 245 *et seq.*, imposing minimum wage requirements, and title 29, section 271, *et seq.*, treating overtime hours and rates of compensation. As the district court concluded, however, these provisions do not apply to federal employees in Puerto Rico. First, "[p]ersons employed by the Government of the United States" are specifically excluded from coverage under the minimum wage provisions. *See* P.R. Laws Ann. tit. 29, § 246e (1985).[21] Second, while the statute is silent as to whether federal employees are also excluded from coverage under the overtime provisions, Commonwealth employees are exempted, *see* P.R. Laws Ann. tit. 29, § 285 (1985),[22] and the Puerto Rico government has given its

[20]Section 246e provides in part that:

> (a) This act shall not apply to:
>
> . . .
>
> (2) Persons employed by the Government of the United States of America or by the Government of the Commonwealth of Puerto Rico, with the exception of those agencies or instrumentalities of the latter which operate as private businesses or enterprises . . . .

[22]Section 285 provides in part that:

> The provisions of this Act shall not apply to the employees of the Commonwealth Government, the Municipal governments, the Government of the Capital, or of the agencies or instrumentalities of said governments, excepting such agenices or instrumentalities as are devoted to agricultural, industrial, commercial or public-service enterprises.

opinion on two separate occasions that federal employees were intended to be exempted as well.

As exhibits to their motion to dismiss, defendants submitted to the district court two opinion letters from the Commonwealth's Department of Labor and Human Resources.[23] In both, the Department adopted the view that the minimum wage and overtime provisions with which we are concerned did not apply to federal employees in Puerto Rico. According to the Department, the "legislative intention that prompted the enactment of both [sets of provisions] was to make them apply exclusively to the private enterprise and to local state government enterprises that function as private businesses." Moreover, it saw "no reason" to include federal employees under the laws while excluding Commonwealth employees. While these opinion letters do not have the force of law, they represent the views of the Department responsible for overseeing the enforcement of the provisions. *See* P.R. Law Ann. tit. 29, § 246. In the absence of any Commonwealth court decision discussing the applicability of section 285's exemption provision to federal employees, we rely on the government's views, particularly since we find them reasonable and plaintiffs have proffered nothing to persuade us otherwise.

The primary argument plaintiffs muster against this interpretation of the Puerto Rico provisions appears to be a constitutional one. Citing *Garcia* v. *San Antonio Me-*

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[23]The first letter, apparently written in response to an inquiry from the Office of the Judge Advocate, Department of the Army, at Fort Buchanan, is dated July 23, 1980, and is signed by the then Secretary for the Department of Labor and Human Resources, Carlos S. Quiros. The second letter, a response to an inquiry from the United States Department of Justice, District of Puerto Rico, is dated June 4, 1984, and is signed by Julio Cruz Rodriguez, Esquire, for the Solicitor of Labor.

tropolitan Transit Authority, 105 S.Ct. 1005 (1985), plaintiffs argue that the Commonwealth of Puerto Rico cannot exempt itself, and by extension the federal government, from its own statutes. We fail to see how *Garcia* is relevant to this case. *Garcia* held that the FLSA applies to state employees. Here, no one disputes the applicability of the federal statute to either federal or Commonwealth employees in Puerto Rico. Moreover, there is nothing unconstitutional about a state establishing different wage provisions for government employees than for their private sector counterparts so long as the laws are rationally based. *See generally* L. Tribe, *Constitutional Law* § 16-2 (1978) (classifications used in economic legislation are valid under the equal protection clause if rationally related to a legitimate public purpose). We therefore affirm the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico laws.

While it is not entirely clear from the record before us, plaintiffs also appear to assert a claim for back wages and for overtime under 29 U.S.C. § 218(b)(2).[24] That is, it is possible that, while plaintiffs are not entitled to the benefit of the Commonwealth laws, they have a claim for back

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[24]Section 218(b)(2) provides:

> (2) any employee employed in a non-appropriated fund instrumentality under the jurisdiction of the Armed Forces, shall have his basic compensation fixed or adjusted at a wage rate that is not less than the appropriate wage rate provided for in section 206(a)(1) of this title (except that the wage rate provided for in section 206(b) of this title shall apply to any employee who performed services during the workweek in a work place within the Canal Zone), and shall have his overtime compensation hourly rate not less than the overtime rate provided for in section 207(a)(1) of this title.

pay even under the FLSA standard. We are unsure whether this is so since plaintiffs have not specifically alleged exactly how defendants have violated section 218(b)(2). In its opinion, the district court appeared to recognize section 218(b)(2) as an additional basis for plaintiffs' claims but it did not reach this issue before dismissing the case. Now that the rather complex jurisdictional issues have been resolved, and it is clear that the case is properly before the district court, we direct the court to address the merits of this particular claim, assuming of course plaintiffs wish to press it.

We therefore hold that the district court has jurisdiction over plaintiffs' FLSA claims against FBICS and its subdivisions in respect to its nonappropriated funds, and accordingly we vacate the lower court's judgment dismissing plaintiffs' action. We affirm the district court's finding that the case was properly removed from the Superior Court of Puerto Rico. We also affirm the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico laws. Finally, we remand for consideration of plaintiffs' possible section 218(b)(2) claim. Each party shall bear its own costs.

So ordered.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 85-1095.

ANGEL M. COSME NIEVES, ET AL.,
Plaintiffs, Appellants,

v.

COL. ROBERT C. DESHLER, ETC., ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: March 18, 1986

This cause came on to be heard on appeal from the United States District Court for the District of PUERTO RICO, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The district court's finding that the case was properly removed from the Superior Court of Puerto Rico and the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico Laws are affirmed.

The judgment of the district court dismissing plaintiffs' action is vacated and the cause is remanded to the district court for consideration of plaintiffs' possible section 218 (b)(2) claim in accordance with the opinion filed this day.

Each party shall bear their own costs.

By the Court:

Francis P. Scigliano, *Clerk*.

FPI-MAR – 2-12-79-3M-1497

[cc: Messrs. Vazquez Matias, Willard and Reilly]

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§ 203. Definitions

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * *

1966 Amendment. Subsec. (d). Pub.L. 89-601, § 102(b), expanded the definition of employer to include a state or a political subdivision thereof with respect to employees in a hospital, institution, or school referred to in the last sentence of subsec. (4) of this section, or in the operation of a railway or carrier referred to in such sentence.

Subsec. (e). Pub.L. 89-601, § 103(a), excluded from the definition of "employee", when that term is used in the definition of the term "man-day", any agricultural employee who is the parent, spouse, child, or other member of his employer's immediate family and any agricultural hand harvest laborer, paid on a piece rate basis, who commutes daily from his permanent residence to the farm on which he is so employed, and who has been employed in agriculture less than 13 weeks during the preceding calendar year.

Subsec. (m). Pub.L. 89-601, § 101(a), added provisions for determining the wage of a tipped employee.

Subsec. (n). Pub.L. 89-601, § 215(a), struck out provision which directed that the definition of "resale" was not applicable when "resale" was used in subsection (s)(1) of this section.

Subsec. (r). Pub.L. 89-601, § 102(a), extended activities performed for a business purpose to include activities in the operation of hospitals, institutions for the sick, aged, or mentally ill or defective, schools for the handicapped, elementary and secondary schools, institutions of higher learning, or street, suburban, or interurban electric railway or local trolley or motorbus carriers if subject to regulation by a state or local agency regardless of whether public or private or whether operated for profit or not for profit.

Subsec. (s). Pub.L. 89-601, § 102(c), removed the gross annual business level tests of $1,000,000 for retail and service enterprises, street, suburban, or interurban electric railways or local trolley or motorbus carriers, and brought within the coverage of the gross annual business test all enterprises having employese engaged in commerce in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce, lowered the minimum gross annual volume test for covered enterprises from $1,000,000 to $500,000 for the period from Feb. 1, 1967, through Jan. 31, 1969, and to $250,000 for the period after Jan. 341, 1969, retained the $250,000 annual gross volume test for coverage of gasoline service establishments, and expanded coverage to include laundering or cleaning services, construction or reconstruction activities, or operation of hospitals, certain institutions for the care of the sick, aged, or mentally ill, certain special schools, and institutions of higher learning regardless of annual gross volume.

Subsec. (t). Pub.L. 89-601, § 101(b), added subsec. (5).

Subsec. (u). Pub.L. 89-601, § 103(b), added subsec. (u).

Subsec. (v), (W). Pub.L. 89-601, § 102(d), added subsecs. (v), (w).

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

* * *

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and sub-

contractors shall cause goods to be produced by home workers;

* * *

Wage rates superseded by recommendation of special industry committee

(c)(1) The rate or rates provided by subsection (a)(1) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Island s only for so long as and insofar as such employee is covered by a wage order (A) heretofore or hereafter issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, and (B) which prescribes a wage order rate which is less than the wage rate in effect under subsection (a)(1) of this section.

(2)(A) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is at least $2 an hour shall, except as provided in paragrpah (3), be increased –

(i) effective January 1, 1978, by $0.25 an hour or by such greater amount as may be recommended by a special industry committee under section 208 of this title, and

(ii) effectrive January 1, 1979, and January 1 of each succeeding year, by $0.30 an hour or by such greater amount as may be so recommended by such a special industry committee.

(B) Each wage order rate under a wage order described in paragraph (1) which on December 31, 1977, is less than $2 an hour shall, except as provided in paragraph (3), be increased –

(i) effective January 1, 1978, by $0.20 an hour or by such greater amount as may be recommended by a special industry committree under section 208 of this title, and

(ii) effective January 1, 19798, and January 1 of each succeeding year—

(I) until such wage order rate is not less than $2.30 an hour, by $0.25 an hour or by such greater amount as may be so recommended by a special industry committee, and

(II) if such wage order rate ius not less than $2.30 an hour, by $0.30 an hour or by such greater amount as may be so recommended by a special industry committee.

(C) In the case of any employee in agriculture who is covered by a wage order issued by the Secretary pursuant to the recommendations of a special industry committee appointed pursuant to section 205 of this title, to whom the rate or rates prescribed by subsection (a)(5) of this section wuold otherwise apply, and whose hourly wage is increased above the wage rate prescribed by such wage order by a subsidy (or income supplement) paid, in whole or in part, by the government of Puerto Rico, the applicable increases prescribed by sub-paragraph (A) or (B) shall be applied to the sum of the wage rate in effect under such wage order and the amount by which the employee's hourly wage is increased by the subsidy (or income supplement) above the wage rate in effect under such wage order.

(3) If the wage rate of an employee is to be increased under this subsection to a wage rate which equals or is greater than the wage rate under subsection (a)(1) of this section which, but for paragraph (1) of this subsection, would be applicable to such employee, this subsection

shall be inapplicable to such employee and the applicable rate under subsection (a)(1) of this section shall apply to such employee.

(4) Each minimum wage rate prescribed by or under paragraph (2) shall be in effect unless such minimum wage rate has been superseded by a wage order (issued by the Secretary pursuant to the recommendation of a special industry committee convened under section 208 of this title) fixing a higher minimum wage rate.

* * *

1966 Amendment. Subsec. (a). Pub.L. 89-601, § 301(a), inserted ", or is employed in an enterprise engaged in commerce or in the production of goods for commerce," in the opening provisions.

Subsec. (a)(1). Pub.L. 89-601, § 301(a), raised the minimum wage to not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966, and not less than $1.60 thereafter, except as otherwise provided in this section.

Subsec. (a)(4). Pub.L. 89-601, § 301(b), added subsec. (a)(4).

Subsec. (a)(5). Pub.L. 89-601, § 302, added subsec. (a)(5).

Subsec. (b). Pub.L. 89-601, § 303, substituted provisions for a minimum wage for employees covered for the first time by the Fair Labor Standards Amendments of 1966 (other than newly covered agricultural employees) at not less than $1 an hour during the first year from the effective date of the 1966 amendments, not less than $1.15 an hour during the second year from such date, not less than $13.0 an hour during the third year from such date, not less than $1.45 an hour during the fourth year from

such date, and not less than $1.60 an hour thereafter, for provisions setting a timetable for increases in the minimum wage of employees first covered by the Fair Labor Standards Amendments of 1961.

Subsec. (c). Pub.L. 89-601, § 304, provided for a percentage minimum wage increase for employees in Puerto Rico and the Virgin Islands who are covered by wage orders already in effect as the equivalent of the percentage increase on the mainland, provided for minimum wages for employees brought within coverage of this chapter for the first time by the Fair Labor Standards Amendemnts of 1966 at rates to be set by special industry committees so as to reach as rapidly as is economically feasible without substantially curtailing employment the objectives of the minimum wage prescribed for mainland employees, and eliminated the review committees that had been established by the Fair Labor Standards Amendments of 1961.

Subsec. (e). Pub.L. 89-601, § 305, added subsec. (e).

* * *

§ 207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a *workweek longer than forty hours unless* such employee receive compensation for his employment in excess of the hours above specified at a rate *not less than one and one-half times* the regular rate at which he is employed.

* * *

Historical Note

1961 **Amendment.** Subsec. (a). Pub.L. 87-30, § 6(a), designated existing provisions as subsec. (a)(1), inserted "in any workweek" therein, and added subsec. (a)(2).

Subsec. (b)(2). Pub.L. 87-30, § 6(b), substituted "in excess of the maximum workweek applicable to such employee under subsection (a) of this section" for "in excess of forty hours in the workweek."

Subsec. (d)(5), (7). Pub.L. 87-30, § 6(c), (d), substituted "in excess of this maximum workweek applicable to such employee under subsection (a) of this section" for "forty in a workweek" in par. (5) and "the maximum workweek applicable to such employee under subsection (a) of this section" for "forty hours" in par. (7).

Subsec. (e). Pub.L. 87-30, § 6(e), substituted "the maximum workweek applicable to such employee under subsection (a) of this section", "subsection (a) or (b) of section 206 of this title (whichever may be applicable" and "such maximum" for "forty hours", "section 206(a) of this title" and "forty in any", respectively.

Subsec. (f). Pub.L. 87-30, § 6(f), substituted "the maximum workweek applicable to such employee under such subsection" for "forty hours" in two instances.

Subsec. (h). Pub.L. 87-30, § 6(g), added subsec. (h).

* * *

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b. That part of the Judgment which ordered adjudged and decreed that the district court's dismissal of plaintiffs' claims brought under section 218(a) of the FLSA and the Puerto Rico Laws are affirmed:

3. The following statutes are invoked as basis of this appeal to the Supreme Court:

a. 28 U.S.C. 1254(1)
b. 28 U.S.C. 2101(c)
c. 28 U.S.C. Rules 10, 11, 13, 15, 23, 33 of the Supreme Court.

WHEREFORE Most respectfully pray that this Honorable Court take notice of this Notice of Appeal for all legal purposes and for all purposes deemed necessary by this Court.

At San Juan, Puerto Rico, May 31, 1986.

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I have mailed by placing same in a federal post office with enough air mail stamps affixed, a copy of the preceding motion to:

a The Solicitor General
Department of Justice
Washington, D.C. 20530

b) Mr. Vincent E. Reilly, Esq.
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Office of the Judge Advocate General
Department of the Army
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At San Juan, Puerto Rico, May 31, 1986.

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No. 85-2045

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANGEL M. COSME NIEVES, ET AL., PETITIONERS

v.

COL. ROBERT C. DESHLER, COMMANDING OFFICER, FORT BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that this action against a non-appropriated fund instrumentality of the United States and members of the United States armed forces for back pay and damages under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, was improperly removed to federal district court from the Superior Court of Puerto Rico. Petitioners also argue that the court below erred by rejecting their claims seeking back pay and damages under Puerto Rico local law.

1. Respondent Fort Buchanan Installation Club System (FBICS), a non-appropriated fund instrumentality of the United States, operates the Commissioned Officers' Open Mess and the Package Beverage Branch at the Fort Buchanan military base, which is located in Puerto Rico (Pet.

App. 25a).[1] The individual respondents were the commanding officers at Fort Buchanan (*id.* at 15a-16a & n.1, 26a n.2). Petitioners, employees of FBICS, commenced this action in the Superior Court of Puerto Rico alleging that respondents failed to pay proper wages and overtime, in violation of the relevant provision of the Fair Labor Standards Act, 29 U.S.C. 218, and the allegedly more beneficial provisions of Puerto Rico law. Petitioners sought back pay in the amount of $58,508.66 and additional penalties and liquidated damages. Pet. App. 26a.

Respondents removed the action to the United States District Court for the District of Puerto Rico and the district court denied petitioners' motion to remand (Pet. App. 9a-12a). The district court found that it had jurisdiction of the action under 28 U.S.C. 1337, that removal was proper under the general removal statute, 28 U.S.C. 1441(a), and that Congress had not expressly prohibited removal of actions under the Fair Labor Standards Act. The court of appeals denied petitioners' application for a writ of mandamus seeking review of the district court's decision denying their motion to remand (Pet. App. 13a). The district court subsequently granted respondents' motion to dismiss (*id.* at 15a-22a). It found that petitioners' employer was the United States and that, because petitioners sought more than $10,000 in back pay and damages, the action fell within the exclusive jurisdiction of the United States Claims Court. The court also ruled that "there is no justifiable basis for [petitioners'] assertion that the so-called 'more beneficial' [Puerto Rico] laws apply to federal employees" such as petitioners (*id.* at 21a).

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[1] A non-appropriated fund instrumentality is an entity that does not receive its monies by congressional appropriation and instead generates income primarily from its own activities. *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 729-730 n.1 (1982).

The court of appeals unanimously affirmed in part and reversed in part (Pet. App. 24a-41a). It first concluded that petitioners were not required to bring this action in the Claims Court (*id.* at 28a-34a). Turning to the question of removal, the court of appeals noted that the FLSA provides that an action for back pay "may be maintained in any Federal or State court of competent jurisdiction" (29 U.S.C. 216(b)). The court observed that the general statute governing removal provides that removal is permissible "[e]xcept as otherwise expressly provided by Act of Congress" (28 U.S.C. 1441(a)) and held that the provision of the FLSA authorizing the maintenance of an action for back pay does not constitute such an express prohibition of removal. It stated that "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal. If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here" (Pet. App. 36a (footnote omitted)).

The court of appeals also rejected petitioners' claim that they were entitled to back pay and damages under certain provisions of Puerto Rico law. It first held that the FLSA itself does not "incorporate existing state law; and it certainly does not guarantee [petitioners], as employees covered by the FLSA, the benefit of more favorable Puerto Rico laws that do not of their own force apply to federal employees" (Pet. App. 37a-38a). The court examined the Puerto Rico statutes relied upon by petitioners and concluded that the statutes did not apply to federal employees (*id.* at 38a-40a). It therefore affirmed the dismissal of petitioners' claims under those statutes.[2]

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[2]The court concluded that petitioners might be entitled to back pay under the FLSA standard applicable to employees of non-appropriated fund instrumentalities, 29 U.S.C. 218(b)(2). It directed the district court to consider this claim on remand. Pet. App. 40a-41a.

2. Petitioners' principal contention (Pet. 13-21) is that this action under the Fair Labor Standards Act was not removable to federal district court. The decision of the court of appeals rejecting this claim is correct and does not conflict with any decision of this Court. Furthermore, the decision does not present a conflict with a decision of another court of appeals warranting review by this Court.

a. The general removal statute states in pertinent part that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed * * * to the district court" (28 U.S.C. 1441(a)).[3] The statute that is the basis of petitioners' claim, the Fair Labor Standards Act, provides that "[a]n action to recover [the damages authorized by the Act] may be maintained against any employer * * * in any Federal or State court of competent jurisdiction" (29 U.S.C. 216(b)). This provision simply creates a cause of action that may be asserted in either state or federal court; it does not by its terms restrict the removal of an action to federal court and, therefore, does not constitute the express statutory prohibition needed to preclude removal. Compare, *e.g.*, 15 U.S.C. 77v(a) (cases brought in state court under Securities Act of 1933 "shall [not] be removed to any court of the United States"). As the court below concluded, "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. * * * If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here" (Pet. App. 36a (footnote omitted)).

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[3]The Superior Court of Puerto Rico constitutes a state court for purposes of this provision. *Kane* v. *Republica De Cuba*, 211 F. Supp. 855, 856 (D.P.R. 1962).

Petitioners rely upon *Johnson* v. *Butler Brothers*, 162 F.2d 87 (8th Cir. 1947), which addressed the removability of an FLSA action under the previous version of the general removal statute. That statute did not specify the standard for determining whether removal of an action was prohibited; in particular, the statute did not state that an action was removable "[e]xcept as otherwise expressly provided" by Congress (see 28 U.S.C. (1946 ed.) 71). The court of appeals in *Johnson* found that Congress had failed "clearly and accurately to express its intent" regarding removal, but ultimately concluded that Congress intended to bar removal of FLSA actions under the general removal statute (162 F.2d at 89).

The court below—the first court of appeals to address this issue since the revision of the removal statute in 1948—concluded that the new statutory standard, specifying that removal is permitted in the absence of an "express[ ]" provision to the contrary, distinguished the present case from *Johnson* and justified a different result. Pet. App. 35a-36a; see also *Baldwin* v. *Sears, Roebuck & Co.*, 667 F.2d 458, 460 n.4 (5th Cir. 1982) (holding that actions under the Age Discrimination in Employment Act—which contains language similar to the FLSA—are removable; court declined to follow *Johnson* on the ground that the 1948 revision of the removal statute put "the removability of FLSA actions in a very different light"). That determination is in accord with the weight of district court decisions regarding the issue. See, *e.g.*, *Taylor* v. *Brown*, 461 F. Supp. 559 (E.D. Tenn. 1978); *Hill* v. *Moss-American, Inc.*, 309 F. Supp. 1175 (N.D. Miss. 1970); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3729, at 495-496 (2d ed. 1985); but see, *e.g.*, *Bintrim* v. *Bruce-Merilees Electric Co.*, 520 F. Supp. 1026 (W.D. Pa. 1981). In view of the change in the terms of the removal statute after the

decision in *Johnson*, the decision of the court below does not create a conflict warranting review by this Court.[4]

b. The decision of the court below upholding the removal of this action is correct for the additional reason that—entirely apart from the removability of FLSA actions as a general matter—respondents were entitled to remove this action to federal court because of their status as federal officials.[5] Congress has specifically provided that a civil action against "[a]ny officer of the United States" or "a member of the armed forces of the United States" relating to acts done under color of office may be removed to federal district court (28 U.S.C. 1442(a)(1), 1442a). This ground for removal is not dependent upon the subject of the plaintiff's claim. *Ibid.*; cf. *Venable* v. *Richards*, 105 U.S. 636 (1881). Since the individual respondents are members of the United States armed forces, they plainly were entitled to remove the action to federal district court on this ground.

3. Petitioners also contend (Pet. 21-25) that the court below erred in concluding that certain Puerto Rico statutes do not apply to employees of the federal government. The first group of provisions cited by petitioners, which set forth minimum wage requirements, plainly are inapplicable here because "[p]ersons employed by the Government of the

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[4]Petitioners also rely (Pet. 20-21) upon a passage in a 1958 Senate committee report stating that FLSA actions are not removable. But, as the court of appeals noted (Pet. App. 36a n.18), the statute to which the report related concerns the removability of state workmen's compensation actions and did not amend either the general removal statute or the FLSA. The statement in the report therefore is not probative of Congress's intent in enacting either of the latter statutes. Petitioners' citation (Pet. 19-20 & n.5) of *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), is inapposite because that case does not relate to 28 U.S.C. 1441(a), the portion of the removal statute at issue here.

[5]The district court did not address this ground for removal because it rested its decision on the general removal statute (Pet. App. 10a & n.1).

United States of America" are specifically excluded from their coverage (P.R. Laws Ann. tit. 29, § 246e(a)(2) (1985)).[6]

Provisions in the second group, which relate to working hours and overtime pay, do not contain an express exclusion for federal employees, although employees of the Commonwealth of Puerto Rico are exempted (P.R. Laws. Ann. tit. 29, § 285 (1985)). The court of appeals noted that the Department of Labor and Human Resources of the Commonwealth of Puerto Rico has issued two opinion letters stating that the exemption provision extends to federal employees as well. The court correctly concluded that "[i]n the absence of any Commonwealth court decision discussing the applicability of [the] exemption provision to federal employees," it was appropriate to adopt the Department's view. Pet. App. 39a; see also *id.* at 20a-21a (district court opinion).[7] Review by this Court of this question of Puerto Rico law is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986

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[6]Petitioners argue (Pet. 22-23) that this express statutory exemption should be ignored because the Puerto Rico legislature was required to exempt federal employees from the statute until the FLSA was amended to apply to federal employees until 1974. Granting all of petitioners' premises, their argument is fatally defective because the Puerto Rico legislature revised this statute in 1979 and did not eliminate the exclusion for federal employees. See 1979 P.R. Laws 266.

[7]Petitioners' contrary argument (Pet. 24-25) is based upon their apparent belief that Puerto Rico may not choose to exempt federal employees from these statutory requirements. As the court of appeals noted (Pet. App. 37a-38a, 39a-40a), this position is obviously incorrect because nothing in the Constitution or the FLSA bars Puerto Rico from making such a choice.